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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No.

W. J. DILLNER TRANSFER COMPANY,
Appellant,

vs.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, ET AL,
Appellees.

Appeal from the Supreme Court of Pennsylvania. From the Pittsburgh District.

JURISDICTIONAL STATEMENT

I.

THE OPINION BELOW BY THE PENNSYLVANIA SUPERIOR COURT IS REPORTED AT, 175 SUPERIOR COURT REP. 472.

Copy of the opinion is annexed hereto as appendix A. The Supreme Court of Pennsylvania denied a petition for leave to appeal, "Per Curiam." Appellant contends that this honorable Court has jurisdiction hereof and makes this statement in compliance with the Revised Rules of the Court.

II.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

(A) Nature of Proceeding

This case involves the imposition of cease and desist orders against Appellant for alleged violation of its Certificates of Public Convenience and Necessity, under the Public Utility Law of Pennsylvania, without according to Appellant the protection of due process of law and equal protection of the law as required by the 14th Amendment. The proceedings were instituted under appropriate sections of the said Public Utility Law, hereafter quoted.

(B) Jurisdictional Dates

The opinion and judgment of the Superior Court was entered July 13th, 1954. The Pennsylvania Supreme Court denied the petitions for leave to appeal on Sept. 27th, 1954, On Oct. 5th the Pennsylvania Supreme Court granted Appellant's petition to bring the record back to that Court for the purpose of prosecuting this appeal. On Dec. 24th Appellant filed its Notice of Appeal in the office of the Prothonotary in Pittsburgh in accord with Rule 10 of the Revised Rules of this Court. The Prothonotary has now certified the record to this Court.

(C) Statutory Basis for Jurisdiction

Jurisdiction of this honorable Court to review the decisions and judgments here appealed from is based upon Section 1257(2) of Title 28, U. S. Code.

(D) Cases Believed to Sustain Jurisdiction

The questions presented here are clearly defined and there is no element of dispute as to what was done by the Appellee Commission.

In *Morgan* v. *United States,* 304 U. S. 1 this Court in two opinions (one on petition for reargument) held that procedure such as that invoked against this appellant constituted a vital defect and a denial of due process of law.

In the Chinese case *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, this Court again upheld the right to due process of law and condemned the practice of permitting the same person to prosecute and judge.

In *Ohio Bell Telephone Co.* v. *Ohio Public Utilities Commission* 301 U. S. 292 this Court dealt with a situation almost in similar circumstances as we have here. The Appellee Commission based its case upon records taken from other cases and files upon which Appellant had no opportunity to cross examine the persons involved as prior witnesses. There is no room for dispute concerning the manner in which Appellant has been subjected to arbitrary procedure.

The desist order is so broad in scope as to violate the "due process" clause of the 14th Amendment. *Russell C. House Transfer and Storage Co.* v. *U. S.* 189 Fed. 2nd 349.

We take the position that denial of due process of law and equal protection of the law is just as vital to the aggrieved party, whether it be covered by the shield of the 5th or the 14th Amendement to the Constitution of the United States.

(E) Statutes Involved

Appellee Commission claims that the Pennsylvania Public Utility Law, empowers it to deprive persons of rights without regard to the fundamental principles of due process of law. We submit that any such law would be unconstitutional.

The relevant sections of the Pennsylvania Public Utility Law follow:

> Section 1001. Complaints.—The commission, or any person, corporation, or municipal corporation having

an interest in the subject matter, or in any public utility concerned, may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission. Any public utility, or other person, or corporation, subject to this act, likewise may complain of any regulation or order of the commission, which the complainant is or has been required by the commission to observe or carry into effect. The commission, by regulation, may prescribe the form of complaints filed under this section.

SECTION 1005. Decisions by Commission.—After the conclusion of the hearing, the commission shall make and file its findings and order with its opinion, if any. Its findings shall be in sufficient detail to enable the court on appeal, to determine the controverted question presented by the proceeding, and whether proper weight was given to the evidence. A copy of such order, certified under the seal of the commission, shall be served by registered mail upon the person, corporation, or municipal corporation against whom it runs, or his attorney, and notice thereof shall be given to the other parties to the proceedings or their attorney. Such order shall take effect and become operative as designated therein, and shall continue in force either for a period which may be designated therein, or until changed or revoked by the commission. If an order cannot, in the judgment of the commission, be complied with within the time designated therein, the commission may grant and prescribe such additional time as, in its judgment, is reasonably necessary to comply with the order, and may, on application and for good cause shown, extend the time for compliance fixed in its order.

SECTION 1008. Investigations.—The commission may, on its own motion and whenever it may be necessary in the performance of its duties, investigate and examine the condition and management of any public utility or any other person or corporation subject to this act. In conducting such investigations the commission may proceed, either with or without a hearing, as it may

deem best, but it shall make no order without affording the parties affected thereby a hearing.

We urge the view that where the word hearing is used in the foregoing sections, it must mean a fair, adequate and impartial hearing and not a mere formality.

Although a Petition to Remand was argued at length, including the question of trial by jury the Court below did not discuss the following section in its opinion. The Public Utility Law clearly reserves trial jury of factual issues.

> SECTION 1110. Right to Trial by Jury.—Nothing in this act contained shall be construed to deprive any party, upon any such appeal and judicial review of the proceedings and orders of the commission, of the right to trial by jury of any issue of fact raised thereby or therein, where such right is secured either by the Constitution of the Commonwealth or of the United States, but in every such case such right of trial by jury shall remain inviolate: Provided, however, That when any appeal is taken, such right shall be deemed to be waived upon all issues, unless expressly reserved in such reasonable manner as shall be prescribed by the Superior Court.

We have been unable to find any substantial judicial interpretation of this section.

Appellant, through its predecessor, was in business prior to Jan. 1, 1914, the effective date of the first Public Service Law of Pennsylvania and one of the certificates here in dispute was based upon that early right.

We have been unable to locate any specific rules of the Superior Court relating to the above quoted section.

III.

QUESTIONS PRESENTED

The questions presented upon this appeal arise from interpretation by the Court below, of the Pennsylvania Public Utility Law as follows:

(a) Does the statute in question operate to deprive appellant of the benefit of due process of law by permitting the same person or persons who prepared the complaint or Rule against appellant, and who conducted and prosecuted the hearings thereon, to also prepare and submit the decision in the case, for the Pennsylvania Public Utility Commission, without notice to appellant's counsel and thus withholding opportunity to file exceptions or a brief in opposition to the proposed decision?

(b) Does the statute authorize the Pennsylvania Public Utility Commission and the Courts below to arbitrarily ignore the prior interpretative decisions by the said Commission and to subject appellant to restrictions or penalties, although the Commission had previously held otherwise in a substantially similar case?

(c) Does the statute authorize the Commonwealth of Pennsylvania to deprive appellant of vested rights which it had prior to the enactment of the statute, and in substance to repudiate the certificate made by the Public Utility Commission or its predecessor in office?

(d) Did the Courts below fail to protect appellant's right to due process of law and equal protection of the law as required by the 14th Amendment to the Constitution of the United States?

IV.

STATEMENT OF THE CASE

Appellant is a motor carrier of property for hire in both intrastate and interstate commerce and its operating rights date back to 1910, before the Public Service Law of Pennsylvania was enacted. The business was incorporated in 1942 but the Dillner family remained as sole owners. In 1932 the Public Service Commission of Pennsylvania began to regulate motor truckers and the Dillners were awarded one of the earliest certificates, which is now in dispute in the Harrisburg case.

This case involves a certificate granted to Appellant in 1947. A dispute arose concerning the interpretation of the language used and the Commission's Counsel prepared a Rule to show cause why it should not be punished, against Appellant, which was adopted by the Commission. At the hearings Counsel for the Commission prosecuted the Rule and prepared the final decision and order which was submitted to the Commission without notice to Appellant's Counsel. The Examiner who heard the case made no proposed findings. The decision and order submitted by Counsel for the Commission was adopted and an appeal was taken by Appellant. See Appendix B annexed hereto.

V.

THE FEDERAL QUESTIONS INVOLVED ARE SUBSTANTIAL

The questions involved are substantial, indeed they are fundamental.

Appellant posed a question as to the fairness of permitting the same persons to institute, prosecute and determine a quasi-criminal proceeding and the Appellee Commission replied to the Court below, as follows:

> "The averment that the Commission acts as complainant prosecutor, judge and jury in this proceeding is recognized and accepted procedure in administrative proceedings. The ultimate answer to such criticism is the the administrative procedure provides adequate appellate review."

This attitude indicates a new standard of justice.

The question of borrowing and transplanting evidence from other cases into this case remains unanswered. Appellees did not attempt to justify or excuse such practice. Appellant was faced with some old transcripts of testimony and letters. It was impossible to cross examine the persons involved in these papers forced upon us as evidence.

This Court has adhered to the rule that certificates of public convenience, once granted, may not be enlarged or restricted by subsequent interpretation where the language used is not ambiguous. A certificate is for the information and protection of the public. Such rulings have been in connection with interstate certificates but the fundamental law should apply to all such certificates whether intrastate or interstate.

Opinion of the Superior Court

The opinion of the Pennsylvania Superior Court is annexed hereto. The findings of the Appellee Commission are

quoted at length but no substantial appraisal was made of the voluminous evidence presented in behalf of Appellant. The Court held that if the record contained any evidence to support the findings of the Commission the Court would "affirm," which they did.

The Court brushed aside with slight notice the objections argued by Appellant's Counsel based upon Constitutional questions. Upon argument the Court seemed to take the position that the Appellee Commission was not bound by the rigid requirements of due process as provided in the 14th Amendment.

Conclusion

Appellant has been deprived of the right and benefit of due process of law. If Appellant had been accorded the simple but basic right to present exceptions to the final decision submitted by the Commission's Counsel to the Commission the present situation of hardship and confusion would probably have been avoided. This Court should act to halt these violations of fundamental rights. The decision of this Court in *Morgan* v. *U. S. supra*, fits the situation perfectly.

If the elementary rules of evidence had been observed by the Commission there would have been very little evidence in the record against Appellant. Jurisdiction should be noted.

Respectfully submitted,

J. Paul Rupp,
Ernie Adamson,
16 N. 2nd St.,
Harrisburg, Pa.,
Attorneys for Appellant.

Feb. 18th, 1955.

Bailey and Rupp,
of Counsel.

APPENDIX "A"

Opinion of Pensylvania Superior Court

W. J. Dillner Transfer Company, Appellant, v. Pennsylvania Public Utility Commission (No. 2)

Public Utility Law—Construction by Commission of its own orders — Judicial review — Practice — Rehearing — Rights of motor carrier—"Heavy-hauling" authority.

Opinion by Rhodes, P. J., July 13, 1954:

The Pennsylvaina Public Utility Commission by its order of August 11, 1952, directed W. J. Dillner Transfer Company, a motor carrier, to "cease and desist the transportation of sheet steel and coils of steel, or any other transportation not authorized by its certificates of public convenience."

Among Dillner's certificated rights is the following grant (A. 61744, Folder 3) by order of the Commission dated May 19, 1947:

"To transport as a Class C carrier, property in shipments weighing five thousand (5,000) pounds or more, which because of its size or weight requires special handling and the use of special equipment such as trucks having winches or special equipment attached, or trucks of special body construction, or pole trailers, or drop-frame trailers, from points in the City of Pittsburgh, Allegheny County, and within a radius of fifty (50) miles thereof, to other points in Pennsylvania." This order further provided that Dillner's "application insofar as it refers to all other transportation be and is hereby refused for lack of necessity."

The Commission, on January 16, 1950, issued a rule against Dillner to show cause why its certificate of public convenience, at A. 61744, Folder 3, should not be canceled or other penalties imposed for violation of its certificate. The Commission charged Dillner with alleged violations on December 3, 1949, and December 19, 1949. On December 3,

1949, Dillner transported twenty-one coils of steel from Carnegie-Illinois Steel Corporation, Irwin Works, Dravosburg, Pennsylvania, to Enamel Metal Strip Corporation, Allentown, Pennsylvania; and on December 19, 1949, Dillner transported sheet steel in three tractor-trailer units from Carnegie-Illinois Steel Corporation, Irwin Works, to Budd Company, Philadelphia, Pennsylvania. The Commission in its rule charged that such transportation of steel was in violation of Dillner's certificate of public convenience because "the property transported . . . did not require special handling or the use of special equipment, and . . . none of the . . . tractor-trailer trucks were of special body construction or equipped with winches or special equipment."

Dillner admitted, in its answer to the rule, the shipments of steel set forth in the Commission's rule; but Dillner denied, however, that such shipments were in violation of its certificated rights, and averred that the shipments were of such weight as to require special equipment, and that the vehicles were of special body design. Dillner further alleged in its answer that the shipments were within its certificated rights at A. 61744, Folder 3, as a "heavy-hauler"; that it had full right and authority to transport the shipments in issue under its certificates at either Folder 2 or Folder 3, A. 61744; and that at Folder 2, A. 61744, it had the certificated right to transport "property" from points in Allegheny County to other points in Pennsylvania subject to certain restrictions as to "goods" and "merchandise."

The Commission thereafter, upon petitions filed with it, permitted certain motor carriers (Modern Transfer Company, Inc., Highway Express Lines, Inc., Philadelphia-Pittsburgh Carriers, Inc., Kramer Brothers Freight Lines, Inc., and Lancaster Transportation Company) to intervene in support of the Commission's rule; and two carriers (John Benkart & Sons Company and DeBolt Transfer) having heavy-hauling rights similar to Dillner were per-

mitted to intervene for the purpose of supporting Dillner's position that the transportation in question came within the scope of Dillner's certificate.

Several hearings were held by the Commission at which witnesses testified to the effect that the transportation of coils of steel and sheet steel required neither "special handling" nor "special equipment." There was also testimony that the vehicles used by Dillner in the questioned haulage were similar in type and equipment to those used by common carriers for the transportation of general commodities. On behalf of Dillner there was evidence presented to the effect that shipments such as those here involved could not be loaded manually, and that the trucks used to transport the steel were specially designed for such purpose.

The Commission in its order of August 11, 1952, after reviewing the original application proceeding at A. 61744, Folder 3, concluded that Dillner's certificate did not comprehend the authority claimed. The Commission ruled that the transportation of coils of steel and sheet steel here involved did not require special handling or the use of the special equipment within the limited rights granted under the certificate, commonly referred to as "heavy-hauling" rights. The Commission also said in its order:

"The type of service offered by and the rights granted to the so-called 'heavy-haulers' has been limited to the transportation of extremely heavy or bulky machinery, equipment or materials such as are commonly used in or in conjunction with construction projects. The transportation of such property is a specialized transportation service, which requires for its efficient conduct inherently special vehicular equipment. The temporary or permanent attachment of blocks, chocks or chains to an otherwise ordinary truck or trailer does not transform it into such special equipment."

Accordingly, the Commission made absolute its rule to show cause, and entered its order directing Dillner to

"cease and desist the transportation of sheet steel and coils of steel, or any other transportation not authorized by its certificates of public convenience." Dillner filed petitions for rehearing which were denied by the Commission. Dillner then took the present appeal.

The determinative question is whether the transportation of coils of steel and sheet steel of the size and weight here involved required special handling and the use of special equipment.[1] Under Dillner's certificate there must be both special handling and the use of special equipment. Our inquiry is limited as to whether there was substantial evidence to support the Commission's findings and conclusions. Section 1107 of the Public Utility Law of May 28, 1937, P. L. 1053, as amended, 66 PS §1437; *Pittsburgh & Lake Erie Railroad Company v. Pennsylvania Public Utility Commission,* 170 Pa. Superior Ct. 411, 415, 416, 85 A. 2d 646; *Zurcher v. Pennsylvania Public Utility Commission,* 173 Pa. Superior Ct. 343, 347, 98 A. 2d 218. We shall therefor limit our determination to the exact issue before us.

In the absence of compelling reasons, we will not set aside the action of the Commission in interpreting the extent and nature of certificates of public convenience issued by it. Ordinarily, a court will not invalidate a construction by an administrative agency of its own orders unless the result is clearly erroneous, arbitrary, or unsupported by evidence.

---

[1] The Commission in its order of August 11, 1952, found:

"The coils of steel were transported in a tractor-trailer unit, described as an open-top vehicle. The coils of steel were approximately 36 inches wide and 36 inches in diameter, weighed 2,300 pounds, and were blocked with ordinary 8-inch wooden blocks curved to fit the coil.

"The sheet steel, in bundles weighing 4,800 to 11,000 pounds, was transported in three tractor-trailer units described as regular flat body trailers. The bundles of sheet steel were secured by what is commonly known as chain binders; the chains being drawn through the holes along the sides where stake racks are usually set."

42 Am. Jur., Public Administrative Law, §101, p. 431; *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413, 414, 65 S. Ct. 1215, 89 L. Ed. 1700; *W. J. Dillner Transfer Co. v. Pennsylvania Public Utility Commission (No. 1)*, 175 Pa. Superior Ct. 461, A. 2d . As an administrative body issuing a certificate of public convenience the Commission is especially qualified to interpret and construe the original grant. The Commission is naturally cognizant of the factual and technical matters upon which such construction depends. However, the Commission's interpretation of its own rules and regulations is not conclusive on the courts although it may be persuasive. *Lancaster Transportation Co. v. Pennsylvania Public Utility Commission*, 169 Pa. Superior Ct. 284, 292, 82 A. 2d 291. Thus, if the evidence supports its findings the Commission may determine what comes within the "heavy-hauling" authority grant and what may be transported by carriers having the right to transport general property.

In the present proceeding the Commission, in its construction of the authority granted to Dillner, considered the general language used as well as the history and record of the application proceedings. The Commission pointed out that Dillner's application filed with the Commission on August 13, 1945, at A. 61744, Folder 3, consisted of two parts. Dillner there sought a certificate of public convenience "to transport by Motor Truck, from Pittsburgh and points within 50 miles thereof, to points in Pennsylvania, and vice versa, articles which require special service, handling or equipment, *also* castings, machinery, machines and parts thereof, metal pipe, plates, sheets, bars, billets, blooms, pigs, residues and ingots, in shipments weighing 5,000 lbs. or more." [Italics supplied.] The Commission by its order of May 19, 1947, granted Dillner, after hearing on its application, the right to transport as a Class C carrier, from the City of Pittsburgh and within a radius of fifty miles thereof to other points in Pennsylvania, property

which because of its size or weight required special handling and the use of special equipment, and refused the application in so far as it referred to other transportation. The Commission has held that on the evidence before it the transportation of coils of steel and sheet steel was not within the ambit of the heavy-hauling rights which had been granted to Dillner. In addition to its statement that ordinary trucks and trailers were not transformed into special equipment by the attachment of blocks or chains, the Commission pointed out that Dillner's heavy-hauling rights were made state-wide to compensate the carrier for purchasing the special equipment required, and that it was necessary to draw a definite distinction between special authority permitting "heavy-hauling" and authority granting generally the right to haul property, goods, or commodities.

The record clearly discloses that the transportation of the coils of steel and the sheet steel did not require special handling and the use of special equipment, and that therefore it was not within the scope of Dillner's certificated rights at A. 61744, Folder 3, but rather within the requested authority which was denied by the Commission.

Herbert E. Rutrecht, sales manager of Modern Transfer Company, Inc., testified that the vehicle used by Dillner in transporting coils of steel on December 3, 1949, was an open-top vehicle of the same type used by all common carriers for the transportation of general commodities. He further testified that Modern Transfer Company, Inc., operates approximately forty such open-top trailers, and that they were used for general commodity purposes. Dillner agreed that the vehicle used to transport the coils of steel "did not have chains and binders attached, nor any other special equipment other than a forward reinforced bulkhead attached."

An inspector for the Pennsylvania Public Utility Commission testified concerning the three vehicles used by Dillner

to transport the sheet steel on December 19, 1949. He stated that these vehicles were flat-body trailers without "any contrivances of any kind," and that they could not be characterized as "special."

John M. Paterson, an officer of Highway Express Lines, Inc., testified that his company had been transporting steel and steel products for twelve years, and that it does not employ any special types of equipment for such transportation. He testified that coils of steel and sheet steel are hauled in normal open-top trailers which may be equipped with rigs for the insertion of chain binders. He also testified that equipment having reinforced bulkheads and anchoring devices for chain binders is not considered special equipment, and is used for the transportation of commodities which must be secured to the vehicle, and which are likely to shift.

I. C. Gutman, general manager of Modern Transfer Company, Inc., testified that in the transportation of steel his company used the general type of equipment in use in general commodity hauling. He further testified that the company tranported steel coils from Carnegie-Illinois Steel Corporation several times a week in the normal type of open-top van trailers, which are not special equipment.

James W. Cunnane, an official of Philadelphia-Pittsburgh Carriers, Inc., testified that his company hauled coils of steel and sheet steel in standard trailers, closed or open, without the use of any special type of equipment, without special handling, and without using special personnel; and that this carrier did not use chain binders in hauling steel although its vehicles were equipped with reinforced forward bulkheads which are standard.

J. J. McGary, traffic manager of Lancaster Transportation Company, testified that the company transports coils of steel and sheet steel with its regular equipment, that is, Fruehauf trailers, the same type of equipment as used in hauling other commodities without chains and binders.

It appears that the Carnegie-Illinois Steel Corporation loaded the four shipments, which were the subject of the Commission's rule to show cause, with its own overhead crane, and that it also furnished any blocks or cradles used to hold these loads in place.

On the record before us we are of the opinion that the interpretation placed by the Commission on its grant of authority to Dillner at A. 61744, Folder 3, was supported by substantial evidence, and that the cease and desist order was not erroneous as a matter of law, nor was it unreasonable or arbitrary.

The rule to show cause issued by the Commission set forth the specific violations of Dillner's certificated rights. Dillner received notice, and the answer filed by it disclosed that it was fully aware of the issue and charges made against it. The matter was considered at several hearings and much evidence was presented by the interested parties. We think the issue was clear, and that the findings of the Commission were sufficiently definite to dispose of the questions raised. Cf. *Ryan v. Pennsylvania Public Utility Commission,* 143 Pa. Superior Ct. 517, 521, 17 A. 2d 637. There was no denial of due process in this respect or in the manner the Commission functioned. See 42 Am. Jur., Public Administrative Law, §25, p. 315; *Humphrey v. United States,* 295 U. S. 602, 55 S. Ct. 869, 79 L. Ed. 1611, 1619.

We find no reversible error in the refusal by the Commission of Dillner's petition for rehearing. Dillner by its petition for rehearing sought the opportunity to present further evidence and to convince the Commission of error in its final order. The grant or the refusal of a petition for rehearing, or further hearing, is a matter within the discretion of the Commission. *Yellow Cab Co. v. Pennsylvania Public Utility Commission,* 161 Pa. Superior Ct. 41, 55, 54 A. 2d 301.

In its answer to the Commission's rule, Dillner claimed, at least inferentially, the right to transport the coils of steel

and sheet steel throughout Pennsylvania, under its authority at Folder 2 of A. 61744 which Dillner interpreted as giving the right to haul statewide all types of property or general commodities. This question was not further raised or passed upon by the Commission in the present proceeding. However, the matter has been decided adversely to Dillner in a separate complaint proceeding appealed to this Court in which the order of the Commission was affirmed. *W. J. Dillner Transfer Co. v. Pennsylvania Public Utility Commission (No. 1)*, 175 Pa. Superior Ct. 461, A. 2d .

APPENDIX "B"

Pittsburgh District

The Rule to show cause, against appellant, charged the illegal transportation of several loads of steel as follows:

> "It further appears that the property transported did not require special handling or the use of special equipment and that none of the said tractor-trailer trucks were of special body construction or equipped with winches or special equipment. It thus appears that both of said shipments were in violation of respondents certificated rights at A. 61744, at Folder 3."

Counsel for the Commission, who had prepared the Rule and prosecuted the Rule at the several hearings, then submitted without notice to appellants counsel, an order which was adopted by the Commission as follows:

> "It is ordered:
>
> 1. That the rule instituted on January 16, 1950, against W. J. Dillner Transfer Company, respondent, at A. 61744 Folder 3, be and is hereby made absolute.
>
> 2. That W. J. Dillner Transfer Company, respondent, its agents and employees, immediately cease and desist the transportation of sheet steel and coils of steel, or any other transportation not authorized by its certificates of public convenience."

Counsel for the Commission in submitting the proposed decision to the Commission neglected to include therein citations of two prior decisions of the said Commission which were favorable to and indeed almost controlling in behalf of appellant.

If Counsel for appellant had been accorded the opportunity to take exception to the proposed decision and order it is fair to assume that the Commission would have taken different action.

FILED
MAR 11 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954

No. 600

W. J. DILLNER TRANSFER COMPANY,
Appellant

vs.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, ET AL.,
Appellees

(PITTSBURGH DISTRICT)

Appeal from the Supreme Court of the Commonwealth of Pennsylvania

MOTION TO DISMISS APPEAL

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1954

No.

W. J. Dillner Transfer Company,
Appellant

vs.

Pennsylvania Public Utility
Commission, et al.,
Appellees

I.
MOTION TO DISMISS APPEAL

Pennsylvania Public Utility Commission, by Jack F. Aschinger, Assistant Counsel, and Thomas M. Kerrigan, Acting Chief Counsel, moves the Supreme Court of the United States to dismiss the appeal of W. J. Dillner Transfer Company, from an order of the Pennsylvania Public Utility Commission as affirmed by the Superior Court of Pennsylvania in *W. J. Dillner Transfer Co. v. Pa. P.U.C., et al.*, 175 Pa. Superior Ct. 472, 107 A. 2d 164 (1954), the Supreme Court of Pennsylvania denying "Per Curiam" on September 27, 1954, the Petition of W. J. Dillner Transfer Company for Allowance of Appeal from the Opinion and Order of the Superior Court of Pennsylvania.

II.

NATURE OF THE CASE AND RULING BELOW

W. J. Dillner Transfer Company, appellant in this proceeding, holds, at Application Docket No. 61744, Folder 3, a certificate of public convenience issued on May 19, 1947, by the Pennsylvania Commission, which granted this carrier the following right:

> "To transport, as a Class C carrier, property in shipments, weighing five thousand (5,000) pounds or more, which because of its size or weight requires special handling and the use of special equipment such as trucks having winches or special equipment attached, or trucks of special body construction, or pole trailers, or drop-frame trailers, from points in the City of Pittsburgh, Allegheny County, and a radius of fifty (50) miles thereof, to other points in Pennsylvania.
>
> "It is Further Ordered that the application in-so far as it refers to all other transportation be and is hereby refused for lack of necessity."

On January 16, 1950, the Commission on its own motion instituted a Rule against W. J. Dillner Transfer Company, which charged the company with transportation of sheet steel and coils of steel in violation of appellant's so-called "heavy-hauling" rights as set forth.

Intervening and supporting the Commission's Rule, and intervening appellees in the Superior Court were Modern Transfer Company, Inc., Highway Express Lines, Inc., Philadelphia-Pittsburgh Carriers, Inc., Kramer Brothers Freight Lines, Inc., and Lancaster Transportation Company. These general commodity carriers alleged that the transportation involved was in direct and unlawful competition with the service furnished by them. John Benkart & Sons Company and Debolt Transfer, carriers having "heavy-hauling" rights generally similar to the right here held by Dillner also intervened in the Commission proceeding for the purpose of supporting Dillner's position that the transportation complained of in the Commission's Rule came within the scope of "heavy-hauling" rights.

Five hearings were held, briefs were filed, and oral argument heard before the Commission. The Commission upon completion of the hearings filed its Report and Order, dated August 11, 1952. The Commission found that W. J. Dillner Transfer Company had invaded a transportation field not contemplated in its certificate of public convenience; and that the phrase "to transport property, which because of its size or weight requires special handling and the use of special equipment," or generally similar phrases, contemplated the transportation of extremely heavy or bulky machinery, equipment or materials, such as power shovels, bulldozers, etc., and not sheet steel or coils of steel. The Commission also found that transportation of such property is a specialized transportation service which requires for its efficient conduct inherently special vehicular equipment. The Commission directed that W. J. Dillner Transfer Company immediately

cease and desist the transportation of sheet steel and coils of steel, or any other transportation not authorized by its certificates of public convenience.

W. J. Dillner Transfer Company, and intervenors, Debolt Transfer and John Benkart & Sons Company, then petitioned the Commission for rehearing, reargument, rescission, modification and supersedeas of its order, dated August 11, 1952. The Commission granted supersedeas pending further consideration and disposition of the petition. On November 26, 1952, the Commission denied the petition for rehearing, etc., of W. J. Dillner Transfer Company, and intervenors.

After an appeal was taken to the Superior Court of Pennsylvania by W. J. Dillner Transfer Company, Dillner petitioned the court for remand of the record to the Commission with instructions to incorporate Commission minutes, memoranda and letters. The Commission filed an answer in opposition to the petition. A reply to the answer, in the form of a letter, dated June 23, 1953, was filed with the court by Dillner. The Commisison by letter, dated June 26, 1953, to the Prothonotary, submitted an answer to the reply for the court's information, if the court was disposed to consider the correspondence. The Superior Court on July 13, 1953, ordered that argument on the petition for remand of record and answer thereto be heard at the time the appeal was listed for argument.

The Superior Court of Pennsylvania in its opinion found that the action of the Commission in interpreting the extent and nature of the certificate of public convenience issued by it was supported by substantial evidence; that the Commission, in its construction of

the authority granted to Dillner, considered the general language used as well as the history and record of the application proceeding. The Superior Court concluded that the record clearly established that the transportation of the coils of steel and the sheet steel did not require special handling and the use of special equipment; that such transportation was not within the scope of Dillner's certificated rights and, in fact, had specifically been denied by the Commission.

The Superior Court further found no reversible error in the refusal by the Commission of Dillner's petition for rehearing. With respect to the petition for remand of the record to incorporate Commission minutes, staff reports and letters, and with respect to the manner the Commission functioned, the court found that there was no denial of due process.

Appellant sought allowance of an appeal in the Supreme Court of Pennsylvania. The Supreme Court refused to allow the appeal. Appellant now seeks review by the Supreme Court of the United States.

III.

ARGUMENT IN SUPPORT OF MOTION TO DISMISS

(A) There is no jurisdiction, under the provisions of Title 28, U. S. Code, Section 1257(2) for this appeal

---

The statutory provision which is relied upon by appellant to sustain the jurisdiction of the Supreme Court of the United States to review the decision involved is Section 1257(2) of Title 28, U. S. Code.

The portion of that section of the Judicial Code upon which appellant relies is that portion which reads as follows:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) *By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.*" (Italics ours)

It is submitted that the validity of the statute involved here, namely, Pennsylvania Public Utility Law, Act of May 28, 1937, P. L. 1053, as amended, Section 1001, Section 1005, Section 1008, and Section 1110, is *not*

questioned by appellant. Appellant questions only the interpretation of the statute as reflected in the order of the Commission and in its confirmation by the appellate courts in the Commonwealth of Pennsylvania.

The United States Supreme Court is bound by the construction given to state statutes by state courts: *Aero Mayflower Transit Co. v. Board of R. R. Commissioners of State of Mont.*, 332 U. S. 495, 68 S. Ct. 167, 92 L. Ed. 99 (1947). A decision of the state courts resting upon the construction and not upon the validity of a state statute does not present a federal question: *Ferry v. King County*, 141 U. S. 668, 35 L. Ed. 895 (1891).

(B) There is no substantial federal question presented in this appeal.

Appellant contends that it has been deprived of the right and benefit of procedural due process of law. It is submitted that at all stages of the proceeding before the Pennsylvania Commission and the appellate courts of Pennsylvania, appellant had a full hearing, the right to file a brief, and the right to orally argue this matter before the Commission and Court, and full opportunity to meet all the issues in this proceeding. The right of review to determine whether the findings of the Commission are based upon substantial evidence or whether they are arbitrary, oppressive, and therefore in excess of its powers, and whether the order made is responsive to and justified by such findings, satisfies the requirement of due process: *Arkansas Wholesale Grocers' Ass'n. v. Federal Trade Com'n.*, 18 F. (2) 866 (1927), certiorari denied 275 U. S. 533, 48, S. Ct. 30, 72 L. Ed. 411 (1927); *Asbury Truck Co. v. Railroad Commission of California*, 52 F. (2) 263 (1931), affirmed per curiam: 287 U. S. 570, 53 S. Ct. 94, 77 L. Ed. 501.

The contentions of appellant have been succinctly answered by President Judge Rhodes of the Superior Court of Pennsylvania in his opinion in this case when he said:

> "On the record before us we are of the opinion that the interpretation placed by the Commission on its grant of authority to Dillner at A. 61744,

Folder 3, was supported by substantial evidence, and that the cease and desist order was not erroneous as a matter of law, nor was it unreasonable or arbitrary.

"The rule to show cause issued by the Commission set forth the specific violations of Dillner's certificated rights. Dillner received notice, and the answer filed by it disclosed that it was fully aware of the issue and charges made against it. The matter was considered at several hearings and much evidence was presented by the interested parties. We think the issue was clear, and that the findings of the Commission were sufficiently definite to dispose of the question raised. Cf. Ryan v. Pennsylvania Public Utility Commission, 143 Pa. Superior Ct. 517, 521, 17 A. 2d 637. There was no denial of due process in this respect or in the manner the Commission functioned. See 42 Am. Jur., Public Administrative Law, § 25, p. 315; Humphrey v. United States, 295 U. S. 602, 55 S. Ct. 869, 79 L. Ed. 1611, 1619."

The Superior Court of Pennsylvania provided a complete judicial review of the order of the Commission and properly concluded that there was no error of law, lack of evidence to support the order of the Commission, or violation of constitutional rights.

CONCLUSION

The appeal of W. J. Dillner Transfer Company should be dismissed because (1) there is no jurisdiction, under the provisions of Title 28, U. S. Code, Section 1257(2) for this appeal, and (2) there is no substantial federal question presented in this appeal.

Respectfully submitted,
JACK F. ASCHINGER
Assistant Counsel
THOMAS M. KERRIGAN
Acting Counsel
For Pennsylvania Public Utility Commission.

Certificate of Service

I have this day mailed to all counsel of record herein copies of the within Motion to Dismiss in postpaid, properly addressed covers.

THOMAS M. KERRIGAN
Acting Counsel.

Dated March , 1955.

FILED
OCT 19 1955
HAROLD B. WILLEY, Clerk

No. 6054

W. J. [redacted],
Appellant,

vs.

PENNSYLVANIA [redacted],
Appellee,

and

[redacted],
Intervening Appellee.

On Appeal from the Supreme Court of the State of Pennsylvania
(Pittsburgh District)

MOTION TO DISMISS APPEAL

[redacted]
Paul R. [redacted]
[redacted]
Attorneys for Intervening Appellee.

[redacted]
Of Counsel.

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IN THE

Supreme Court of the United States.

October Term, 1954.

No. 600.

W. J. DILLNER TRANSFER COMPANY,
Appellant,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, ET AL.,
Appellees.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.
FROM THE PITTSBURGH DISTRICT.

MOTION TO DISMISS APPEAL.

I.

MOTION TO DISMISS APPEAL.

The parties for whom this motion is made were all intervening appellees below. This motion to dismiss the present appeal is made on their behalf and involves an order of the Pennsylvania Public Utility Commission as affirmed by the Superior Court of Pennsylvania in *W. J. Dillner Transfer Company v. Pennsylvania Public Utility Commission,* et al, 175 Pa. Superior Ct. 472, 107 A.2d 164 (1954). An application for allocatur was made to the Supreme Court of Pennsylvania and said Court denied the

petition "Per Curiam" on September 27, 1954. This motion to dismiss the appeal is filed in answer to the "Statement as to Jurisdiction" of W. J. Dillner Transfer Company filed in this Honorable Court and served on intervenors on February 17, 1955.

The "Statement as to Jurisdiction" filed by the appellant, W. J. Dillner Transfer Company, is divided into various sections and sub-sections. The chronology of the "Statement as to Jurisdiction" is difficult to follow and the exact basis of this appeal is not easily determinable from a reading of said "Statement as to Jurisdiction." The parties herein, however, will attempt to answer the "Statement as to Jurisdiction" and to submit an argument thereunder as to such points as it is deemed have been presented by the appellant.

II.

NATURE OF THE PROCEEDINGS.

The nature of the proceedings and the rulings below have been fully set forth in the Motion to Dismiss filed by the Pennsylvania Public Utility Commission and, therefore, there appears no need to repeat the same herein. However, it is important to state that the parties for whom this Motion is being filed intervened in the proceedings before the Pennsylvania Public Utility Commission and also intervened in the Court proceeding below. These parties are Modern Transfer Company, Inc.; Highway Express Lines, Inc.; Philadelphia-Pittsburgh Carriers, Inc.; Kramer Bros. Freight Lines, Inc.; and Lancaster Transportation Company. These parties are all common carriers by motor vehicle authorized by the Pennsylvania Public Utility Commission to perform transportation between points in Pennsylvania. The acts complained of against appellant were in direct competition with the services furnished by these parties. These parties have a direct interest in the outcome of the proceedings.

III.

ANSWER TO THE STATEMENT AS TO JURISDICTION OF THE APPELLANT AND ARGUMENT IN SUPPORT OF THE MOTION TO DISMISS THE PRESENT APPEAL.

A. Objection as to Jurisdiction.

The statutory provision relied upon by appellant to sustain the jurisdiction of the Supreme Court of the United States involved herein is Section 1257(2) of Title 28, U. S. Code.

The argument in objection to jurisdiction is fully set forth in the Motion of the Pennsylvania Public Utility Commission concerning whether or not this statute authorizes the present appeal. This argument will not be repeated here but will be augmented only by an additional statement.

A review of the cases cited by the appellant to sustain jurisdiction under the statute quoted above does not support appellant's argument. In each of the cases cited the basis for jurisdiction involved provisions of law not involved herein. These cases were *Morgan v. United States,* 304 U. S. 1; *Wong Yang Sung v. McGrath,* 339 U. S. 33; *Ohio Bell Telephone Co. v. Ohio Public Utilities Commission,* 301 U. S. 292; *Russell C. House Transfer and Storage Co. v. U. S.,* 189 Fed. 2nd 349.

The basis set forth by the appellant for jurisdiction does not support the present appeal and the Motion to Dismiss should be sustained.

B. Answer to the Questions Presented by the Appellant.

The appellant in its "Statement as to Jurisdiction" presents questions which it is presumed are the basis for the present appeal. An answer to each of the questions presented will be set forth below.

The first question presented by appellant is as follows:

> "(a) Does the statute in question operate to deprive appellant of the benefit of due process of law by permitting the same person or persons who prepared the complaint or Rule against appellant, and who conducted and prosecuted the hearings thereon, to also prepare and submit the decision in the case, for the Pennsylvania Public Utility Commission, without notice to appellant's counsel and thus withholding opportunity to file exceptions or a brief in opposition to the proposed decision?"

The question presented here has no factual basis on the record certified to your Honorable Court. Nowhere in the record is there any evidence whatsoever as to the person who prepared the complaint or rule against appellant. It is to be presumed that the complaint was filed in the normal manner by the Pennsylvania Public Utility Commission and it is a known fact as the record will reveal that appellant was given every opportunity to answer and to present evidence throughout the numerous hearings involved before the Pennsylvania Public Utility Commission. The hearings were conducted by an Examiner authorized by law to preside at said hearings and said Examiner had nothing to do whatsoever with the preparation of the complaint or Rule. There is nothing in the record to show otherwise and appellant in its "Statement as to Jurisdiction" states no fact to substantiate any other conclusion. There is nothing of record to show who prepared and submitted the decision in the case to the Pennsylvania Public Utility Commission. The report and order issued in this case purported to be that of the Pensylvania Public Utility Commission and there are no facts of record to show that anyone, other than the Pennsylvania Public Utility Commission, made the decision herein.

Appellant, in its "Statement as to Jurisdiction" has attached what is known as "Appendix B". In Appendix B

appellant without any foundation therefor states that counsel for the Commission submitted the proposed decision to the Commission. A review of the evidence and the record as certified to your Honorable Court will reveal that nowhere in the record, or elsewhere, have such facts been presented and, in fact, not only did the Pennsylvania Public Utility Commission make the order complained of, but the Pennsylvania Public Utility Commission made exhaustive findings of fact and conclusions of law to support its order. It may or may not be that the Pennsylvania Public Utility Commission relied on staff reports in determining the proper terminology to be used in its report and order, after having made full review of the record and after having come to its independent conclusion. Certainly, the Commission was entitled to do this. In *Norris & Hirshberg v. Securities and Exchange Commission,* 163 F. 2d 689, the Court had a similar situation before it and stated, as follows, commencing at page 693:

> "(8, 9) The Commission asserts, and upon remand doubtless will certify, that the summary was not considered as, or in lieu of, the actual evidence. That being true, it falls in the category of internal memoranda made during the decisional process which are never included in a record. An administrative agency, such as the respondent here, may utilize the services of subordinates to sift and analyze the evidence received by the trial examiner and subsequent use by the agency of a written resume of that sifting and analyzing is a part of its internal decisional process which may not be probed on appeal.
>
> As the summary is said to have been prepared by employees simply to aid in the Commission's examination of the record, its use appears to have been a part of the Commission's decisional procedure. We are not concerned with the manner in which the Commission give consideration to the record; it is enough if it cer-

> tifies that its findings arise therefrom. That much is required, but not more. It was, consequently, neither necessary nor proper for the digest of evidence used by the Commission to be made a part of the transcript, if the digest was used only as a help in considering the true record, as the Commission asserts."

In this case the Court also cited with approval and as controlling authority the case of *Morgan v. U. S.*, 298 U. S. 468.

Apparently appellant also intends to argue under this issue whether or not the Pennsylvania Public Utility Commission had the right to institute the proceedings and make a final judgment thereon. Clearly, it seems rather late to raise this argument. All administrative agencies of the Federal and State Governments, in order to carry out their functions, must have investigative powers and must have the power to make final judgment if the agency is to carry out its administrative functions as provided by Congress and the various State legislatures.

It is true that in conducting such proceedings adequate safeguards must be provided so that a full and fair hearing may be provided to all. In the present case a full and fair hearing was provided at all times and every conceivable issue which the appellant wished to raise was permitted. The nature of the charges were known to the appellant at all times and at no time did appellant claim that the nature of the charges were unknown to it.

Appellant states in its "Statement as to Jurisdiction" a vague thought that in the present case:

> "The question of borrowing and transplanting evidence from other cases into this case remains unanswered. Appellees did not attempt to justify or excuse such practice. Appellant was faced with some old transcripts of testimony and letters. It was impossible to cross-examine the persons involved in these papers forced upon us as evidence."

It is noteworthy that appellant does not refer to any particular part of the record nor to any particular evidence in the case. Certainly, evidence was not transplanted from other cases. The only evidence in the case was presented at the hearing and appellant had an ample opportunity to object or to explain all evidence submitted. It is true that the records of the predecessor company of appellant were present at the hearings but such were used only to contradict or as admissions. Nowhere was evidence transplanted from other cases.

The question presented above is without merit and the factual issues raised, if any, are not substantiated by the record as certified and such question as raised is insufficient to sustain its appeal.

The next question presented by the appellant in its "Statement as to Jurisdiction" is as follows:

> "(b) Does the statute authorize the Pennsylvania Public Utility Commission and the Courts below to arbitrarily ignore the prior interpretative decisions by the said Commission and to subject appellant to restrictions or penalties, although the Commission had previously held otherwise in a substantially similar case?"

There certainly is no Federal question presented by the above. Even if the Pennsylvania Public Utility Commission and the Courts below had not followed prior interpretative decisions there would have neither been error at the State level nor at the Federal level. Neither the Pennsylvania Public Utility Commission nor the Courts are bound by stare decisis. This has been decided by your Honorable Court on numerous occasions. However, in any event, the Commission and the Courts did not ignore any prior decisions and it is interesting to note that the appellant does not point out any prior decisions which even it believes to be contradictory. In numerous cases it has been held that the administrative agency's interpretation of its own order

and certificate cannot be disregarded by the Courts. See *I. C. C. v. G. & M. Motor Transfer Co., Inc.*, 64 F. Supp. 302 (D. C., N. C., 1945); *U. S. v. Louisville & Nashville RR. Co.*, 235 U. S. 314 (1914); *Adirondack Transit Lines, Inc. v. U. S.* 59 F. Supp. 503 (D. C., N. Y., 1944); *Dart Transit Co. v. Interstate Commerce Commission*, 110 F. Supp. 876 (District Court, Minnesota, 1953); and *Bowles v. Seminole Rock and Sand Company*, 325 U. S. 410.

Since the issue presented above involves no Federal question and is in conformity with State law, such question is not sufficient to sustain the jurisdiction of this Honorable Court in this matter and the appeal should be dismissed.

The next question presented by the appellant in its "Statement as to Jurisdiction" is as follows:

> "(c) Does the statute authorize the Commonwealth of Pennsylvania to deprive appellant of vested rights which it had prior to the enactment of the statute, and in substance to repudiate the certificate made by the Public Utility Commission or its predecessor in office?"

The issue presented above again involves no Federal question whatsoever. Certainly, the statute relied upon by the appellant does authorize even a cancellation of the certificate of the appellant if proper procedure is followed. However, in the present case the sole effect of the order of the Pennsylvania Public Utility Commission was to explain and interpret the certificate of public convenience outstanding and issued to it. A certificate of public convenience and necessity is not a vested right but is merely a privilege granted by the Pennsylvania Public Utility Commission by virtue of legislative authority. Such privilege is subject to interpretation and even cancellation if proper safeguards are provided.

It is interesting to note that appellant continues to speak of being deprived of certain rights. However, the

report and order of the Pennsylvania Public Utility Commission did not impose any penalties whatsoever and did not in any way affect or punish appellant for acts done in the past. The report and order of the Commission merely passed upon whether or not appellant had violated its certificate and then issued a warning that same should not be violated in the future. Clearly, this is authorized by the Pennsylvania Public Utility Law and, clearly, appellant was dealt with kindly and lightly in view of its persistent illegal operations. Needless to say, appellant had no vested rights prior to enactment of the statute and, certainly, appellant nowhere substantiates this statement either by facts or law.

There is nothing set forth in the issue above which presents a Federal question and the appeal should be dismissed.

The next question presented by the appellant in its "Statement as to Jurisdiction" is as follows:

> "(d) Did the Courts below fail to protect appellant's right to due process of law and equal protection of the law as required by the 14th Amendment to the Constitution of the United States?"

Apparently, the issue presented above is merely a catch-all question pertaining to the other specific questions. A review of the "Statement as to Jurisdiction" reveals no other issues not heretofore answered. However, it is submitted that the record as certified to your Honorable Court will reveal that at all stages of the proceedings before the Pennsylvania Public Utility Commission and the Appellate Court of Pennsylvania, a full hearing was allowed including the right to file briefs and the right to oral argument before the Pennsylvania Public Utility Commission and the Appellate Court.

Such being the case, it seems apparent that no Federal questions have been presented by the present appeal and,

certainly, appellant at no time has been denied due process of law or equal protection of the law as required by the 14th Amendment to the Constitution of the United States. The motion to dismiss the appeal should be sustained.

Only one other issue need be set forth herein. The issue to be argued below is not presented in any of the questions set forth in the "Statement as to Jurisdiction" of the appellant. However, in the "Statement as to Jurisdiction" filed by the appellant, under the heading "Statutes Involved", appellant states that the Pennsylvania Public Utility Law has a provision providing for the right to jury trial in certain types of cases.

It is true that the Pennsylvania Public Utility Law, under Section 1110, reserves the right of jury trial in any issue of fact where such right is secured either by the Constitution of Pennsylvania or the Constitution of United States. In the present case the right of trial by jury for violation of a privilege granted by the Legislature is certainly not of such type as to be secured either by the Constitution of Pennsylvania or of the United States. Furthermore, in the proceeding before the Commission, the appellant at no time requested a jury trial. This issue was also never raised on appeal or at any time by appellants until the present time. Apparently, since appellant does not set forth any argument concerning this issue, it is not seriously pressing the same.

IV.

CONCLUSION.

Since appellant has failed to reveal jurisdiction of this Honorable Court under any statute set forth and, since there is no substantial Federal question involved, the parties hereto move that the appeal be dismissed.

Respectfully submitted,

HAROLD S. SHERTZ,
PAUL F. BARNES,
801 IBM Building,
226 South Fifteenth Street,
Philadelphia 2, Pennsylvania,
Attorneys for Intervening Appellees.

SHERTZ, BARNES & SHERTZ,
801 IBM Building,
226 South Fifteenth Street,
Philadelphia 2, Pennsylvania,
Of Counsel.

March 14, 1955.

Certificate of Service.

I have this day mailed to all Counsel of Record herein, copies of the within Motion to Dismiss Appeal, in postpaid, properly addressed covers.

PAUL F. BARNES

March 14, 1955.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 600

W. J. DILLNER TRANSFER COMPANY
Appellant,

vs.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, ET AL,
Appellees.

Appeal from the Supreme Court of Pennsylvania.
From the Pittsburgh District.

APPELLANT'S REPLY TO MOTION TO DISMISS

A motion to dismiss the above entitled appeal (received by Counsel March 15th) filed by Paul F. Barnes, Esq., of Shertz, Barnes & Shertz, contains an assertion of fact which we believe to be so broad as to be misleading and we feel that the attention of the Court should be directed to such detailed facts as are important here, to correct the error.

The motion to dismiss contains the following (page 4):

> "There is nothing of record to show who prepared and submitted the decision in the case to the Pennsylvania Public Utility Commission."

We called Mr. Barnes by telephone and directed his attention to our view of the matter and on March 18th we received a letter, copy of which is annexed hereto, explaining his attitude.

One of the grounds for this appeal, is the procedure forced upon Appellant by the Public Utility Commission. Over a period of several years this practice of referring all Rule or Complaint cases to the Law Bureau for handling and "recommended" decision seems to have grown into a well established pattern. Upon oral argument of the case at bar the Commission claimed that the statute authorizes such procedure. Mr. Barnes contends that the record merely shows that the Law Bureau "submitted" the recommendations. (without notice to Counsel). We think that this showing is sufficient. However, we wish to point out that Appellant's Petition to Remand, paragraph #7, names the Assistant Counsel who prepared and submitted the orders in question without notice to opposing counsel. The Answer of the Appellee Commission admitted the allegation and sought to justify the practice under the statute.

The Pennsylvania Public Utility Commission is composed of five members, having a fixed tenure of office. The Law Bureau is composed of Counsel and assistants, appointed by the Attorney General and they hold office at his pleasure, not subject to the Commission's pleasure. (See Section 9—Pa. Act March 31, 1937, P. L. 160 No. 43, cited as the Public Utility Law.)

The Public Utility Commission is an independent arm of the Pennsylvania Legislature while the Counsel who constitute the Law Bureau are employees, without fixed tenure of office, of the Executive Department. When the attorneys in the Law Bureau undertake to represent the Commission in any case, wherein

penalties may be imposed, they should be firmly bound by all the Rules of due process. Under the practice and procedure, as applied to this Appellant, the decision herein was actually prepared and submitted to the Commission, without notice to Counsel, by an employee of the Attorney General of Pennsylvania. We contend that the name of the individual Counsel is of no importance. As stated however the record discloses the name of the Counsel.

The Motions to dismiss should be denied and jurisdiction noted.

Respectfully submitted,

J. Paul Rupp
Ernie Adamson
16 N. 2nd Street
Harrisburg, Pa.
Attorneys for Appellant.

Bailey & Rupp
Of Counsel
16 N. 2nd Street
Harrisburg, Pa.

Ernie Adamson, Esquire
c/o Storey, Bailey & Rupp
16 North Market Square
Harrisburg, Pennsylvania

RE: W. J. Dillner Transfer Company

Dear Mr. Adamson:

I have considered your telephonic requests and wish to make the following answer. Apparently the problem that you have is my statement in brief which reads as follows:

> "There is nothing of record to show who prepared and submitted the decision in the case to The Pennsylvania Public Utility Commission."

I have studied your references and nowhere do I find anything that could possibly change the factual statement that I made.

First, we will consider the Appeal at No. 601. In making my statement at that Docket I was answering the question presented by appellant in which the problem presented involved whether or not the same person or persons who conducted and prosecuted the hearings on complaint thereon may also prepare and submit the decision in the case. I have searched the record in vain including the page references you submitted and nowhere in the record does it appear what person, if any, submitted any decision to the Pennsylvania Public Utility Commission. It is true that at the top of the order which you have printed there appears the statement submitted by the Law Bureau. This, however, does not show who in the Law Bureau submitted it or if at all, or if it was the same person that appeared at the hearings. In addition, it may very well be that the report and order was merely reviewed by the law Bureau or maybe technical or

stenographic changes were made. In any event, my statement is absolutely true. There is nothing in the record to show who prepared and submitted the case to the Pennsylvania Public Utility Commission.

Next, we will consider the Appeal at No. 600. Again, your objection appears to be the same statement and, again, I was merely answering the same question presented by the appellant. Again, the mere fact that the rule and the order shows a citation at the top "Submitted by the Law Bureau" does not in any way reveal who the person was or whether or not the submission was merely checking technical or stenographic problems.

You referred me to your petition for remand of the record attached to your brief before the Superior Court. It is true that you make rather graphic allegations therein but these allegations were never proven, were never part of the factual record and nobody is bound by them and, certainly, to state that your mere allegations support conclusions from which no facts were produced is just not realistic.

You also stated to me on the phone that the Commission had admitted these allegations. I have read carefully the Commission's answer and they have admitted no allegations of yours concerning who may have made the final decision in this matter. As a matter of fact, the answer clearly states that the decision is that of the Commission and only the Commission.

I think that if you would carefully review my motion you must conclude, if you are fair, that I have stated the facts as they actually appear. I would be willing to write a letter to the Clerk of the Supreme Court in line with the thoughts I have expressed herein. If you feel that you should write the letter

then, of course, I will have no objection to your using the procedure of a letter rather than a printed reply.

Very truly yours,

SHERTZ BARNES & SHERTZ
(Signed) Paul F. Barnes

PFB:fg
cc: James W. Hagar, Esq.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No.

W. J. DILLNER TRANSFER COMPANY,
Appellant,

vs.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, ET AL,
Appellees.

Appeal from the Supreme Court of Pennsylvania. From the Harrisburg District.

JURISDICTIONAL STATEMENT

I.

THE OPINION BELOW BY THE PENNSYLVANIA SUPERIOR COURT IS REPORTED AT, 175 PA. SUPERIOR COURT REP. 461.

Copy of the opinion is annexed hereto as appendix A. The Supreme Court of Pennsylvania denied a petition for leave to appeal, "Per Curiam." Appellant contends that this honorable Court has jurisdiction hereof and makes this statement in compliance with the Revised Rules of the Court.

II.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

(A) Nature of Proceeding

This case involves the imposition of cease and desist orders against Appellent for alleged violation of its Certificates of Public Convenience and Necessity, under the Public Utility Law of Pennsylvania, without according to Appellant the protection of due process of law and equal protection of the law as required by the 14th Amendment. The proceedings were instituted under appropriate sections of the said Public Utility Law, hereafter quoted.

(B) Jurisdictional Dates

The opinions and judgment of the Superior Court was entered July 13th, 1954. The Pennsylvania Supreme Court denied the petition for leave to appeal on Sept. 27th, 1954. On Oct. 5th the Pennsylvania Supreme Court granted Appellant's petition to bring the record back to that Court for the purpose of prosecuting this appeal. On Dec. 23rd Appellant filed its Notice of Appeal in the office of the Prothonotary at Harrisburg in accord with Rule 10 of the Revised Rules of this Court.

(C) Statutory Basis for Jurisdiction

Jurisdiction of this honorable Court to review the decisions and judgments here appealed from is based upon Section 1257(2) of Title 28, U. S. Code.

(D) Cases Believed to Sustain Jurisdiction

The questions presented here are clearly defined and there is no element of dispute as to what was done by the Appellee Commission.

The desist order is so broad in scope as to be entirely void. The issues of the proceeding were quite narrow. *Russell C. House Transfer and Storage Co.* v. *U. S.*, 189 Fed. 2nd, 349.

In *Morgan* v. *United States*, 304 U. S. 1 this Court in two opinions (one on petition for reargument) held that procedure such as that invoked against this appellant constituted a vital defect and a denial of due process of law.

In the Chinese case *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, this Court again upheld the right to due process of law and condemned the practice of permitting the same person to prosecute and judge in the same case.

In *Ohio Bell Telephone Co.* v. *Ohio Public Utilities Commission*, 301 U. S. 292, this Court dealt with a situation almost in similar circumstances as we have here. The decision of the Ohio Commission was reversed upon these exact grounds. In this case the Appellee Commission based its entire case upon records taken from other cases and files upon which Appellant had no opportunity to cross examine the persons involved as prior witnesses. There is no room for dispute concerning the manner in which Appellant has been subjected to arbitrary procedure.

We take the position that denial of due process of law and equal protection of the law is just as vital to the aggrieved party, whether it be covered by the shield of the 5th or the 14th Amendment to the Constitution of the United States.

Judge Brandeis said, "nothing can be treated as evidence which was not introduced as such." *U. S., et al* v. *Abilene & Sou. Ry Co.*, 265 U. S. 274, 288.

(E) Statutes Involved

Appellee Commission claims that the Pennsylvania Public Utility Law, empowers it to deprive persons of rights without regard to the fundamental principles of due process

of law. We submit that any such law would be unconstitutional, and that no such authority exists.

The relevant sections of the Pennsylvania Public Utility Law follow:

> SECTION 1001. Complaints.—The commission, or any person, corporation, or municipal corporation having an interest in the subject matter, or in any public utility concerned, may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission. Any public utility, or other person, or corporation, subject to this act, likewise may complain of any regulation or order of the commission, which the complainant is or has been required by the commission to observe or carry into effect. The commission, by regulation, may prescribe the form of complaints filed under this section.
>
> SECTION 1005. Decisions by Commission.—After the conclusion of the hearing, the commission shall make and file its findings and order with its opinion, if any. Its findings shall be in sufficient detail to enable the court on appeal, to determine the controverted question presented by the proceeding, and whether proper weight was given to the evidence. A copy of such order, certified under the seal of the commission, shall be served by registered mail upon the person, corporation, or municipal corporation against whom it runs, or his attorney, and notice thereof shall be given to the other parties to the proceedings or their attorney. Such order shall take effect and become operative as designated therein, and shall continue in force either for a period which may be designated therein, or until changed or revoked by the commission. If an order cannot, in the judgment of the commission, be complied with within the time designated therein, the commission may grant and prescribe such additional time as, in its judgment, is reasonably necessary to comply with the order, and may, on application and for good cause shown, extend the time for compliance fixed in its order.

> SECTION 1008. Investigations.—The commission may, on its own motion and whenever it may be necessary in the performance of its duties, investigate and examine the condition and management of any public utility or any other person or corporation subject to this act. In conducting such investigations the commission may proceed, either with or without a hearing, as it may deem best, but it shall make no order without affording the parties affected thereby a hearing.

We urge the view that where the word hearing is used in the foregoing sections, it must mean a fair, adequate and impartial hearing and not a mere formality, but in accord with the rules of "due process of law."

The question of trial by jury the Court below did not discuss. The Public Utility Law clearly reserves trial jury of factual issues.

> SECTION 1110. Right to Trial by Jury.—Nothing in this act contained shall be construed to deprive any party, upon any such appeal and judicial review of the proceedings and orders of the commission, of the right to trial by jury of any issue of fact raised thereby or therein, where such right is secured either by the Constitution of the Commonwealth or of the United States, but in every such case such right of trial by jury shall remain inviolate: Provided, however, That when any appeal is taken, such right shall be deemed to be waived upon all issues, unless expressly reserved in such reasonable manner as shall be prescribed by the Superior Court.

We have been unable to find any substantial judicial interpretation of this section.

Appellant, through its predecessor, was in business prior to Jan. 1, 1914, the effective date of the first Public Service Law of Pennsylvania and one of the certificates here in dispute was based upon that early right.

We have been unable to locate any specific rules of the Superior Court relating to the above quoted section.

III.

QUESTIONS PRESENTED

The questions presented upon this appeal arise from interpretation by the Court below, of the Pennsylvania Public Utility Law as follows:

(a) Does the statute in question operate to deprive appellant of the benefit of due process of law by permitting the same person or persons who conducted and prosecuted the hearings on the complaint, to also prepare and submit the decision in the case, for the Pennsylvania Public Utility Commission, without notice to appellants counsel and thus withholding opportunity to file exceptions or a brief in opposition to the proposed decision?

(b) Does the statute authorize the Pennsylvania Public Utility Commission and the Courts below to arbitrarily ignore the prior interpretative decisions by the said Commission and to subject appellant to restrictions or penalties, although the Commission had previously held otherwise in a substantially similar case?

(c) Does the statute authorize the Commonwealth of Pennsylvania to deprive appellant of vested rights which it had prior to the enactment of the statute, and in substance to repudiate the certificate made by the Public Utility Commission or its predecessor in office?

(d) Did the Courts below fail to protect appellants right to due process of law as required by the 14th Amendment to the Constitution of the United States?

(e) Does the statute authorize the Public Utility Commission to prosecute a complaint against appellant upon one clearly stated ground and then make a blanket cease and desist order against appellant covering all property, denying to appellant equal protection of the law in violation of the 14th Amendment of the Constitution of the United States?

IV.

STATEMENT OF THE CASE

Appellant is a motor carrier of property for hire in both intrastate and interstate commerce and its operating rights date back to 1910, before the Public Service Law of Pennsylvania was enacted. The first Public Service Law became effective on Jan. 1, 1914 and contained the usual grandfather clause." The business was incorporated in 1942 but the Dillner family remained as sole owners. In 1932 the Public Service Commission of Pennsylvania began to regulate motor carriers and the Dillners were awarded one of the earliest certificates, which is now in dispute in this Harrisburg case. In 1951 a question arose about the meaning of the words "property," "goods" and "merchandize" and the Commission required Appellant to answer a complaint. A hearing was held and decision was rendered against Appellant. An appeal was taken and the Commission admitted error and asked the Superior Court to remand the record for further consideration. Further hearings were held at which the Commission incorporated, over objection, records and documents from other cases. No opportunity to cross examine was afforded Appellant. The Commission's Counsel supervised the whole proceeding and submitted the final decision and order to the Commission without notice to Appellant's Counsel. The Examiner who heard the case filed no proposed findings. The Commission adopted the decision and order submitted by its Counsel, which was entirely adverse to Appellant. An appeal was taken to the Superior Court. The Court below took no notice of the lack of a witness who would have been subject to cross examination and ignored Appellant's repeated objections against such procedure.

V.

THE FEDERAL QUESTIONS INVOLVED ARE SUBSTANTIAL

The questions involved are substantial, indeed they are fundamental.

Appellant posed the question of the fairness of permitting the same persons to institute, prosecute and determine a quasi-criminal proceeding and the Appellee Commission replied, as follows:

> "The averment that the Commission acts as complainant prosecutor, judge and jury in this proceeding is recognized and accepted procedure in administrative proceedings. The ultimate answer to such criticism is the administrative procedure provides adequate appellate review."

This attitude indicates a new standard of justice.

The question of borrowing and transplanting evidence from other cases into this case remains unanswered. Appellees did not attempt to justify or excuse such practice. Appellant was faced with some old transcripts of testimony and letters. It was impossible to cross examine the persons involved in these papers forced upon us as evidence; the most important man was dead.

This Court has adhered to the rule that certificates of public convenience, once granted, may not be enlarged or restricted by subsequent interpretation where the language used is not ambiguous. A certificate is for the information and protection of the public. Such rulings have been in connection with interstate certificates but the fundamental law should apply to all such certificates whether intrastate or interstate.

Opinion of the Superior Court

The opinion of the Pennsylvania Superior Court, is annexed hereto. The findings of the Appellee Commission are quoted at length but no substantial appraisal was made of the voluminous evidence presented in behalf of Appellant. The Court held that if the record contained any evidence to support the findings of the Commission the Court would "affirm," which they did.

The Court brushed aside with slight notice the objections argued by Appellant's Counsel based upon Constitutional questions. Upon argument the Court seemed to take the position that the Appellee Commission was not bound by the rigid requirements of due process as provided in the 14th Amendment. See appendix "B" annexed hereto.

Conclusion

Appellant has been deprived of the right and benefit of due process of law. If Appellant had been accorded the simple but basic right to present exceptions to the final decisions submitted by the Commission's Counsel to the Commission the present situation of hardship and confusion would probably have been avoided. This Court should act to halt these violations of fundamental rights.

If the elementary rules of evidence had been observed by the Commission there would have been no evidence in the record against Appellant. Jurisdiction should be noted. We have not sought to describe all of the abitrary findings and errors of the Court below and the Appellee Commission but we do venture to point out that Appellant had been serving the public as a Motor Common Carrier for more than 22 years before the Appellee Commissions predecessor in office required it to apply for and obtain a certificate, in 1932. Now, after an elapse of another 22

year period the Appellee Commission would destroy Appellants original business, without regard to the rules of evidence or fair procedure.

Respectfully submitted,

J. Paul Rupp,
Ernie Adamson,
16 N. 2nd St.,
Harrisburg, Pa.,
Attorneys for Appellant.

Feb. 18th, 1955.

Bailey and Rupp,
of Counsel.

APPENDIX "A"

Opinion of Pennsylvania Superior Court

W. J. Dillner Transfer Co., Appellant, v. Pennsylvania Public Utility Commission (No. 1).

Public utility law—Construction by Commission of its own orders—Judicial review—Rights of motor carrier—Evidence—Scope of order to cease and desist—Procedure—Further hearings after remand—Interventions after remand—Power of Superior Court—Public Utility Law.

Opinion by Rhodes, P. J., July 13, 1954:

This is an appeal from an order of the Pennsylvania Public Utility Commission sustaining a complaint and directing that, "except as authorized by this Commission, W. J. Dillner Transfer Company forthwith cease and desist from the transportation of property from points in Allegheny County to points in Pennsylvania beyond fifty (50) miles from the City of Pittsburgh."

Appellant, W. J. Dillner Transfer Company,[1] admitted transporting the property, a shipment of nails from Rankin, near Pittsburgh, to Lancaster, Pennsylvania. Upon a complaint filed by Lancaster Transportation Company, the issue before the Commission developed into the question whether appellant's certificated authority authorized it to transport general property to points in Pennsylvania beyond fifty miles of the City of Pittsburgh. The Commission held that appellant had no authority to handle the shipment concerning which the complaint was made, and entered the cease and desist order.

In addition to asserting that the Commission erred in interpreting appellant's authority under its certificates, appellant raises certain questions relating to procedural due

---

[1] Appellant is a corporate motor carrier and a successor in interest to a partnership, W. J. Dillner Transfer and Storage Company.

process. We therefore deem it necessary to give a brief chronology of the steps taken before the Commission and on appeal. The complaint of Lancaster Transportation Company set forth that appellant, "on or about March 29, 1950, . . . transported a load of nails from the American Steel and Iron Company at Rankin, Pennsylvania to the Steinman Hardware Company, at Lancaster, Pennsylvania." The complaint referred specifically to appellant's certificated authority at A. 61744, Folder 3, whereby appellant was authorized to transport shipments weighing 5,000 pounds or more, requiring special handling and the use of special equipment, from points in Pittsburgh and within a radius of fifty miles thereof to other points in Pennsylvania.[2] The complaint further alleged generally that the shipment of nails was made without authority from the Commission and in violation of appellant's certificate of public convenience. In its answer appellant admitted transportation of the shipment as alleged but claimed the right to transport such property under its certificates. In its answer appellant expressly set forth rights given it by the Commission at A. 61744, Folder 2, as the basis of its authority to transport property from points in Allegheny County to points in Pennsylvania. Appellant incorporated in the record by reference its certificated authority at A. 61744, Folder 2, at the hearing on September 7, 1950, and relied

---

[2] An order of the Commission dated May 19, 1947, granted appellant the following right:

"To transport as a Class C carrier, property in shipments weighing five thousand (5000) pounds or more, which because of its size or weight requires special handling and the use of special equipment such as trucks having winches or special equipment attached, or trucks of special body construction, or pole trailers, or drop-frame trailers, from points in the City of Pittsburgh, Allegheny County, and within a radius of fifty (50) miles thereof, to other points in Pennsylvania."

upon the following for its alleged right to transport general property:

"(2) To transport, as a Class C carrier, property from points in said county [Allegheny] to other points in Pennsylvania; . . . subject to the following conditions, . . .

"Second: That in the transportation of merchandise from retail stores to customers within the City of Pittsburgh and the County of Allegheny, the certificate holder is limited and restricted to shipments where the goods of only one shipper will be transported on a truck at any one time.

"Third: That the rights, powers and privileges hereby granted with respect to the transportation of goods from points within the City of Pittsburgh and within the County of Allegheny to points outside of Allegheny County are limited to truckload shipments of two thousand pounds or more in weight from one consignor to one consignee, and to points within fifty (50) miles by the usually traveled highways of the City-County Building, Pittsburgh; provided, however, that this restriction shall not apply to the transportation of household goods and office equipment in use . . ."

In the language of the Commission, "The contention of the [appellant] is that nails constitute 'property' but not 'goods' and that, therefore, the 50-mile radius limitation on 'goods' does not apply to the shipment of nails." In its order of December 18, 1950, the Commission rejected appellant's contention, and construed the words "property" and "goods" as synonymous, and held that the limitation to a fifty-mile radius of Pittsburgh applied to the shipment complained against, and that appellant lacked the authority asserted. Accordingly, the Commission, in its order of December 18, 1950, sustained the complaint, directed appellant, except as authorized by the Commission, to "cease and desist from the transportation of property or goods from

points located within Allegheny County to points more than fifty (50) miles by the usually traveled highways from the City-County Building, Pittsburgh."

From the order of the Commission of December 18, 1950, appellant appealed to this Court. Thereafter, upon petition by the Commission, this Court, by order dated March 20, 1951, remanded the record to the Commission "for further hearing, study and consideration and the entry thereafter of such an order in lieu of the order of December 18, 1950, as may be deemed just and proper . . ." Upon return of the record to the Commission, about fifteen carriers, including Motor Freight Express, petitioned the Commission to intervene in the original complaint proceeding and were granted such permission. Appellant's motion to vacate the granting of the petitions to intervene and to strike the petitions from the record was denied. Appellant presented a petition to this Court for a rule on the Commission to show cause why the allowance of the interventions should not be stricken from the record. The Commission filed its answer to the rule issued upon the petition. By our order of March 17, 1952, we discharged the rule without prejudice to appellant's right to question, upon return of the record to this Court, the validity and legality of the Commission's action in allowing intervention of any party after the record had been returned to the Commission and while the appeal was still pending in this Court.

The Commission then held further hearings at which evidence as to rights originally granted appellant, or its predecessor, at A. 24706, was introduced, as well as evidence as to rights at A. 61744. Appellant also presented extensive evidence relating to any rights ever granted to or acquired by it as a motor carrier. On November 10, 1953, the Commission issed an order, in lieu of the order of December 18, 1950, in which it reviewed the evidence, construed the certificates as not granting the appellant the authority asserted, and ordered appellant to cease and desist, "except

as authorized by this Commission, . . . from the transportation of property from points in Allegheny County to points in Pennsylvania beyond fifty (50) miles from the City of Pittsburgh." Appellant's petition for rehearing was denied by the Commission.

Under section 1107 of the Public Utility Law of May 28, 1937, P. L. 1053, as amended, 66 PS §1437, our scope of review on appeal is limited to a determination of whether there is error of law or lack of evidence to support the finding, determination, or order of the Commission, or violation of constitutional rights. *Pittsburgh & Lake Erie Railroad Co. v. Pennsylvania Public Utility Commission,* 170 Pa. Superior Ct. 411, 415, 85 A. 2d 646; *Zurcher v. Pennsylvania Public Utility Commission,* 173 Pa. Superior Ct. 343, 347, 98 A. 2d 218.

Furthermore, the Commission, as an administrative agency, is peculiarly fitted to interpret its own orders, especially where the question raised concerns the extent and limit of transportation rights granted a carrier under a certificate issued by the Commission. In recognition of this principle a court will not set aside a construction placed upon its own orders by an administrative agency unless the result is clearly erroneous, arbitrary, and unsupported by evidence. 42 Am. Jur., Public Administrative Law, §101, p. 431. Cf. *Adirondack Transit Lines, Inc. v. United States,* 59 F. Supp. 503; *Dart Transit Co. v. Interstate Commerce Commission,* 110 F. Supp. 876.

On the substantive question of appellant's authority to haul the shipment, which was the subject of the complaint, there was ample evidence to support the finding of the Commission. The Commission recited the various grants of authority under which appellant and its predecessor operated. This evidence disclosed numerous instances where appellant or its predecessor had requested special permission to transport and had made applications for additional authority. Such action was inconsistent with a gen-

eral right to haul property or goods without restriction from Pittsburgh, or within fifty miles thereof, to any point in Pennsylvania. Appellant must rely on the authority contained in the various certificates issued by the Commission from which no appeal was taken. Cf. *McCormick v. Pennsylvania Public Utility Commission*, 151 Pa. Superior Ct. 196, 30 A. 2d 327. There was no evidence in the record supporting appellant's claim of unlimited authority on the basis of lost certificates or of usage prior to 1914. The Commission in its order of November 10, 1953, made this pertinent summation: "Nothing more than a cursory examination of the original Dillner applications and records is required in order to reach the conclusion that Dillner never sought, was never granted, and, therefore, does not now have the right to transport general property from Allegheny County to any point in Pennsylvania."

Appellant argues it was not sufficiently apprised of the issue in that the complaint set forth and charged a violation of appellant's authority at Folder 3 of A. 61744, where as the Commission based its finding of violation particularly on an interpretation of authority granted at Folder 2 of A. 61744. Admittedly the requirement of procedural due process applies to proceedings before administrative tribunals as well as judicial bodies. The question of what constitutes a specific designation of the issue raised or charges made depends upon the violation alleged and the type of investigation being conducted. *Armour Transportation Co. v. Pennsylvania Public Utility Commission*, 138 Pa. Superior Ct. 243, 250, 251, 10 A. 2d 86; *Ryan v. Pennsylvania Public Utility Commission*, 143 Pa. Superior Ct. 517, 521, 17 A. 2d 637. Paragraph 9 of the complaint, denied in appellant's answer, alleged that the transportation in question was generally "without authority from the Public Utility Commission and in violation of the Certificate of Public Convenience" which appellant held. At the initial hearing appellant's counsel admitted the shipment, offered in evi-

dence appellant's certificates at Folders 2 and 3 of A. 61744, and expressly joined issue on the general question of appellant's authority to transport such shipment under any certificate held by it. The entire proceeding was directed to the question whether authority could be found in any certificate granting appellant the general right of haulage asserted. Appellant was fully aware of the issue. There is no warrant for a conclusion that appellant was denied procedural due process on this ground.

Appellant asserts that, by reason of the additional hearings held on remission of the record to the Commission from this Court, it has been tried twice on a single complaint. Following the appeal from the Commission's order of December 18, 1950, we remanded the record at the instance of the Commission for further proceedings. The petition of the Commission sought remission so that the record could be augmented and a complete analysis made of any and all rights granted appellant from its inception to the present time. The petition of the Commission further set forth that, in view of the broad authority claimed by appellant, the questions raised could not properly be disposed of on the meager record before this Court on appeal. We may remand a record to the Commission for further proceedings, including the taking of additional evidence. Sections 1106 and 1107 of the Act of May 28, 1937, P. L. 1053, 66 PS §§1436, 1437. Our power to order such remand may be exercised either before the appeal is argued or after it is heard. Cf. *Lehigh Valley Railroad Co. v. Public Service Commission,* 80 Pa. Superior Ct. 139; *Bickley v. Pennsylvania Public Utility Commission,* 129 Pa. Superior Ct. 115, 195 A. 162; *Pittsburgh v. Pennsylvania Public Utility Commission,* 171 Pa. Superior Ct. 187, 90 A. 2d 607. At the further hearings all parties, including appellant, were allowed to introduce additional evidence. And appellant was thereby afforded a full opportunity to point to authority for its action and to obtain a definition of

its rights. Appellant joined in making the issue at these additional hearings of which it received ample notice; and the Commission could thereafter properly enter a final amended order. See section 1007 of the Public Utility Law of May 28, 1937, P. L. 1053, 66 PS §1397. The principles governing judicial review of administrative action do not preclude a court from giving an administrative body an opportunity to correct or supplement its original order. *Ford Motor Co. v. National Labor Relations Board,* 305 U. S. 364, 375, 59 S. Ct. 301, 308, 83 L. Ed. 221. The subsequent hearings were on the identical issue raised in the original complaint, and appellant was not deprived of any right thereby.

Finally, appellant questions the validity of the Commission's order allowing intervention of several competing carriers following the remand of the record by this Court prior to argument of the appeal. Procedural questions relating to the addition of formal parties to a proceeding and the allowance of intervention in proceedings before administrative bodies are matters primarily within the discretion of the Commission, subject to the basic requirements of procedural due process such as notice and opportunity to be heard. *Pittsburgh v. Pennsylvania Public Utility Commission,* 153 Pa. Superior Ct. 83, 86, 87, 33 A. 2d 641. Under the statute (section 1104 of the Act of May 28, 1937, P. L. 1053, 66 PS §1434), this Court is given the power to permit intervention by parties on appeal. However, intervention cannot be allowed where it would prejudice a party's rights or defeat the purpose underlying a statute. Cf. *Smith v. Pennsylvania Public Utility Commission,* 174 Pa. Superior Ct. 252, 257, 101 A. 2d 435. It is unnecessary to rule upon the validity of the action of the Commission in allowing numerous other carriers to intervene after remand. It does not appear that the issue was changed, that the proceedings were delayed, or that appellant was prejudiced or deprived of due process by reason of the interven-

tions. The original complainant, Lancaster Transportation Company, remained a party throughout the proceedings before the Commission, and is a party-appellee on appeal. The addition of other parties by intervention following remand was, at most, merely cumulative.

The order of the Commission from which this appeal has been taken is not invalid because it is too broad or too general in its terms. Appellant by its answer to the complaint and by the introduction of evidence joined issue on the question of its authority to transport general property in the Commonwealth beyond a fifty-mile radius of the City of Pittsburgh. The findings made by the Commission on the question of appellant's authority were amply supported by the evidence; the order appealed from was proper and contains no error of law.

The order of the Commission is affirmed.

APPENDIX "B"

(Harrisburg District)

The original complaint, which was not amended, charged Appellant with the illegal transportation of "a partial load of nails, from Rankin, Pa. to Lancaster, Pa."

Counsel for the Commission who had supervised the proceeding and represented the Commission at the hearings, submitted without notice to Appellant's counsel, the following order, which was adopted.

> "It is ordered:
>
> (1) That the Complaint of Lancaster Transportation Company v. W. J. Dillner Transfer Company at C. 15013 be and is hereby sustained."
>
> (2) That, except as authorized by this Commission, W. J. Dillner Transfer Company forthwith cease and desist from the transportation of property from points in Allegheny County to points in Pennsylvania beyond fifty (50) miles from the City of Pittsburgh."

Commissioner Conley voted in the negative.

In reaching the strained conclusions which Commission Counsel formulated and submitted without notice, he relied very heavily upon a stipulation from a record made twenty-two years previously. The man who prepared the stipulation has been dead for many years. In submitting the proposed decision to the Commission, Counsel quoted part of the stipulation but omitted part, as follows:

> "In paragraph 6 of the application, applicant agrees to certain limitation in the transportation of freight going out of Allegheny County. The Applicant will agree to further stipulation as follows:"
>
> "That this type of freight shall be limited to shipments from one consignor to one consignee and to points within a radius of 50 miles from the City of Pittsburgh, except household goods and office equipment in use; . . ." (deletion.)

Counsel for the Commission omitted the following:

> "provided, however, that if the Public Service Commission adopts a general regulation of call and demand service inconsistant herewith, any certificate granted under this application shall be governed by the general regulation rather than this restriction."

If Appellant's Counsel had been afforded proper opportunity, we would have shown to the Commission that shortly after the above stipulation was made the (then) Public Service Commission did promulgate such general regulations and did classify Dillner as a class "D" and "C" carrier, thus voiding the restriction.

Counsel for the Commission also neglected to state in his proposed decision that Dillner's original (grandfather) application did include;

> "and to the handling of shipments requiring special equipment, including rigging for the trucking of steel."

Thus Appellant has been deprived of full and fair opportunity to defend itself from the vigorous attacks by its competitors.

FILED
MAR 11 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954

No. 601

W. J. DILLNER TRANSFER COMPANY,
Appellant

vs.

PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL.,
Appellees

(HARRISBURG DISTRICT)

Appeal from the Supreme Court of the Commonwealth of Pennsylvania

MOTION TO DISMISS APPEAL

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1954

No.

W. J. Dillner Transfer Company,
Appellant

vs.

Pennsylvania Public Utility Commission et al.,
Appellees

I.
MOTION TO DISMISS APPEAL

Pennsylvania Public Utility Commission, by Jack F. Aschinger, Assistant Counsel, and Thomas M. Kerrigan, Acting Chief Counsel, moves the Supreme Court of the United States to dismiss the appeal of W. J. Dillner Transfer Company, from an order of the Pennsylvania Public Utility Commission as affirmed by the Superior Court of Pennsylvania in *W. J. Dillner Transfer Company v. Pa. P.U.C. et al.*, 175 Pa. Superior Ct. 461, 107 A. 2d 159 (1954), the Supreme Court of Pennsylvania denying "Per Curiam" on September 27, 1954, the Petition of W. J. Dillner Transfer Company for Allowance of Appeal from the Opinion and Order of the Superior Court of Pennsylvania.

II.

NATURE OF THE CASE AND RULING BELOW

This proceeding involved a complaint of the Lancaster Transportation Company against the W. J. Dillner Transfer Company in which it was alleged that on or about March 29, 1950, the Company unlawfully transported a shipment of nails in 100-pound kegs from American Steel and Iron Company, Rankin (near Pittsburgh, Pa.), to Steinman Hardware Company, Lancaster, Pennsylvania. At hearing, no testimony was presented. The transportation was admitted. Counsel for complainant and Dillner agreed that the only matter to be determined by the Commission was whether Dillner had authority to transport the shipment named in the complaint. Dillner's certificated authority at A. 61744, Folders 2 and 3 were incorporated into the record by reference. The record was closed. Dillner's rights at A. 61744, Folder 3, in the field of "heavy-hauling" were not involved in this proceeding. The asserted authority for the transportation of the shipment was contained in the certificate, at A. 61744, Folder 2, which reads, in part:

> ". . . to transport, as a Class C carrier, *property* from points in said (Allegheny) County, to other points in Pennsylvania;

> . . . (Provided) . . . that the rights, powers and privileges hereby granted with respect to the transportation of *goods* from points within the City of Pittsburgh and within the County of Allegheny to points outside of Allegheny County are limited to . . . points within fifty (50) miles by the usually travelled highways of the City-County Building, Pittsburgh; . . ." (Italics and insertions ours)

Dillner contended that nails constituted "property" but not "goods" and that, therefore, the 50-mile radius limitation on "goods" did not apply to the shipment of nails. The Commission by its order dated June 20, 1950, concluded that the words "goods" as used in the certificate was synonymous with the word "property", thus the limitation applied, and the Commission sustained the complaint. Dillner appealed to the Superior Court.

Because the record in the complaint was limited to three pages of colloquy between counsel, the Commission petitioned the Superior Court for remission of the record for further hearing, study and consideration and/or the entry of a further order based upon all available facts. The Superior Court remanded the record. Upon return of the record to the Commission, about fifteen (15) carriers were permitted to intervene. Counsel for the Commission participated in the additional hearings for the purpose of introducing into the record relevant documents and correspond-

ence from the Commission's files and for the purpose of developing testimony relating thereto. Upon conclusion of hearings, briefs were filed and oral argument had before the Commission. The Commission on November 10, 1953, entered its final order. It reviewed the original Dillner applications and records and concluded that Dillner never sought, was never granted, and never had the right to transport general property from Allegheny County to any point in Pennsylvania. Dillner petitioned for rehearing which was denied by the Commission. On appeal the Pennsylvania Superior Court affirmed the order of the Commission.

The Superior Court held that the Commission, as an administrative agency, is peculiarly fitted to interpret its own order, especially where the question raised concerns the extent and limit of transportation rights granted a carrier under a certificate issued by it. With respect to the substantive question of Dillner's authority to transport the shipment involved, the Superior Court held that there was ample evidence to support the finding of the Commission. The Court further stated that Dillner must rely on the authority contained in the various certificates issued by the Commission and that there was no evidence in the record supporting Dillner's claim of unlimited authority on the basis of usage prior to 1914.

The Pennsylvania Superior Court considered fully the question of procedural due process; it found in its opinion that the entire proceeding

was directed to the question whether authority could be found in any certificate granting Dillner the general right of transportation as asserted. At the further hearing all parties, including Dillner, were allowed to introduce additional evidence. Dillner was afforded full opportunity to point to authority for its action and to obtain a definition of its rights. Dillner joined in making the issue. The Superior Court stated that there was no warrant for a conclusion that Dillner was denied procedural due process on this ground.

The Pennsylvania Supreme Court denied appellant's petition for allowance of appeal. Appellant now seeks review by the Supreme Court of the United States.

III.

ARGUMENT IN SUPPORT OF MOTION TO DISMISS

(a) There is no jurisdiction under the provisions of Title 28, U. S. Code, Section 1257(a) for this appeal.

The statutory provision which is relied upon by appellant to sustain the jurisdiction of the Supreme Court of the United States to review the decision involved is Section 1257(2) of Title 28, U. S. Code.

The portion of that section of the Judicial Code upon which appellant relies is that portion which reads as follows:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) *By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.*" (Italics ours)

It is submitted that the validity of the statute involved here, namely, Pennsylvania Public Util-

ity Law, Act of May 28, 1937, P. L. 1053, as amended, Section 1001, Section 1005, Section 1008, and Section 1110, is *not* questioned by appellant. Appellant questions only the interpretation of the statute as reflected in the order of the Commission and in its confirmation by the appellate courts in the Commonwealth of Pennsylvania.

The United States Supreme Court is bound by the construction given to state statutes by state courts: *Aero Mayflower Transit Co. v. Board of R. R. Commissioners of State of Mont.,* 332 U. S. 495, 68 S. Ct. 167, 92 L. Ed. (1947). A decision of the state courts resting upon the construction and not upon the validity of a state statute does not present a federal question: *Ferry v. King County,* 141 U. S. 668, 35 L. Ed. 895 (1891).

(b) There is no substantial federal question presented in this appeal.

Appellant contends that it has been deprived of the right and benefit of procedural due process of law. It is submitted that at all stages of the proceeding before the Pennsylvania Commission and the appellate courts of Pennsylvania, appellant had a full hearing, the right to file a brief, and the right to orally argue this matter before the Commission and Court, and full opportunity to meet all the issues in this proceeding. The right of review to determine whether the findings of the Commission are based upon substantial evidence or whether they are arbitrary, oppressive, and therefore in excess of its powers, and whether the order made is responsive to and justified by such findings, satisfies the requirement of due process: ***Arkansas Wholesale Grocers' Ass'n. v. Federal Trade Com'n.,*** 18 F. (2) 866 (1927), certiorari denied 275 U. S. 523, 48 S. Ct. 30, 72 L. Ed. 411 (1927); ***Asbury Truck Co. v. Railroad Commission of California,*** 52 F. (2) 263 (1931), affirmed per curiam: 287 U. S. 570, 53 S. Ct. 94, 77 L. Ed. 501.

It is clearly evident in the opinion of the Pennsylvania Superior Court that the procedural questions were thoroughly considered by the Court. The Superior Court provided a complete

judicial review of the order of the Commission and properly concluded that there was no error of law, lack of evidence to support the order of the Commission, or violation of constitutional rights.

CONCLUSION

The appeal of W. J. Dillner Transfer Company should be dismissed because (1) there is no jurisdiction, under the provisions of the Title 28, U. S. Code, Section 1257(2) for this appeal, and (2) there is no substantial federal question presented in this appeal.

Respectfully submitted,
JACK F. ASCHINGER,
Assistant Counsel
THOMAS M. KERRIGAN,
Acting Counsel
For Pennsylvania Public Utility Commission

Certificate of Service

I have this day mailed to all counsel of record herein copies of the within Motion to Dismiss in postpaid, properly addressed covers.

THOMAS M. KERRIGAN,
Acting Counsel

Dated, March , 1955.

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IN THE

Supreme Court of the United States.

October Term, 1954.

No. 601.

W. J. DILLNER TRANSFER COMPANY,
Appellant,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, ET AL.,
Appellees.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.
FROM THE HARRISBURG DISTRICT.

MOTION TO DISMISS APPEAL.

I.

MOTION TO DISMISS APPEAL.

The parties for whom this motion is made were all intervening appellees below. This motion to dismiss the present appeal is made on their behalf and involves an order of the Pennsylvania Public Utility Commission as affirmed by the Superior Court of Pennsylvania in *W. J. Dillner Transfer Company v. Pennsylvania Public Utility Commission, et al.*, 175 Pa. Superior Ct. 461, 107 A. 2d 159 (1954). An application for allocatur was made to the Supreme Court of Pennsylvania and said Court denied the petition "Per Curiam" on September 27, 1954. This motion to dismiss the appeal is filed in answer to the "Statement as to Jurisdiction" of W. J. Dillner Transfer Company filed in this Honorable Court and served on intervenors on February 17, 1955.

The "Statement as to Jurisdiction" filed by the appellant, W. J. Dillner Transfer Company, is divided into various sections and sub-sections. The chronology of the "Statement as to Jurisdiction" is difficult to follow and the exact basis of this appeal is not easily determinable from a reading of said "Statement as to Jurisdiction." The parties herein, however, will attempt to answer the "Statement as to Jurisdiction" and to submit an argument thereunder as to such points as it is deemed have been presented by the appellant.

II.
NATURE OF THE PROCEEDINGS.

The nature of the proceedings and the rulings below have been fully set forth in the Motion to Dismiss filed by the Pennsylvania Public Utility Commission and, therefore, there appears no need to repeat the same herein. However, it is important to state that the parties for whom this Motion is being filed intervened in the proceedings before the Pennsylvania Public Utility Commission and also intervened in the Court proceeding below. These parties are Breman's Transfer, Al Zeffiro Transfer & Storage, Inc.; Philadelphia-Pittsburgh Carriers, Inc.; Kramer Bros. Freight Lines, Inc.; Highway Express Lines, Inc.; Modern Transfer Company, Inc.; Leaman Transportation Corporation; E. Brooke Matlack, Inc.; Coastal Tank Lines, Inc.; W. F. Crossett, Inc.; A. Duie Pyle, Inc.; Noerr Motor Freight, Inc.; P. W. Keely, t/a Valley Motor Freight; Motor Freight Express, Inc. and Lancaster Transportation Company. These parties are all common carriers by motor vehicle authorized by the Pennsylvania Public Utility Commission to perform transportation between points in Pennsylvania. The acts complained of against appellant were in direct competition with the services furnished by these parties. These parties have a direct interest in the outcome of the proceedings.

III.

ANSWER TO THE STATEMENT AS TO JURISDICTION OF THE APPELLANT AND ARGUMENT IN SUPPORT OF THE MOTION TO DISMISS THE PRESENT APPEAL.

A. Objection as to Jurisdiction.

The statutory provision relied upon by appellant to sustain the jurisdiction of the Supreme Court of the United States involved herein is Section 1257(2) of Title 28, U. S. Code.

The argument in objection to jurisdiction is fully set forth in the Motion of the Pennsylvania Public Utility Commission concerning whether or not this statute authorizes the present appeal. This argument will not be repeated here but will be augmented only by an additional statement.

A review of the cases cited by the appellant to sustain jurisdiction under the statute quoted above does not support appellant's argument. In each of the cases cited the basis for jurisdiction involved provisions of law and factual situations not involved herein. These cases were *Morgan v. United States,* 304 U. S. 1; *Wong Yang Sung v. McGrath,* 339 U. S. 33; *Ohio Bell Telephone Co. v. Ohio Public Utilities Commission,* 301 U. S. 292; *Russell C. House Transfer and Storage Co. v. U. S.,* 189 Fed. 2nd 349.

The basis set forth by the appellant for jurisdiction does not support the present appeal and the Motion to Dismiss should be sustained.

B. Answer to the Questions Presented by the Appellant.

The appellant in its "Statement as to Jurisdiction" presents questions which it is presumed are the basis for the present appeal. An answer to each of the questions presented will be set forth below.

The first question presented by appellant is as follows:

> "(a) Does the statute in question operate to deprive appellant of the benefit of due process of law by permitting the same person or persons who conducted and prosecuted the hearings on the complaint thereon, to also prepare and submit the decision in the case, for the Pennsylvania Public Utility Commission, without notice to appellant's counsel and thus withholding opportunity to file exceptions or a brief in opposition to the proposed decision?"

The question presented here has no factual basis on the record certified to your Honorable Court. The record reveals that this proceeding was instituted by the filing of a complaint by a carrier, Lancaster Transportation Company, charging appellant with certain illegal operations. Appellant was given every opportunity to answer and to present evidence throughout the numerous hearings involved before the Pennsylvania Public Utility Commission. The hearings were conducted by an Examiner authorized by law to preside at said hearings and said Examiner had nothing to do whatsoever with the preparation of the complaint or the Commission's decision in this proceeding. There is nothing in the record to show otherwise and appellant in its "Statement as to Jurisdiction" states no fact to substantiate any other conclusion. There is nothing of record to show who prepared and submitted the decision in the case to the Pennsylvania Public Utility Commission. The report and order issued in this case purported to be that of the Pennsylvania Public Utility Commission and there are no facts of record to show that anyone, other than the Pennsylvania Public Utility Commission, made the decision herein.

Appellant relies heavily on the fact that counsel for the Pennsylvania Public Utility Commission participated in the further hearings held in this proceeding before the

Commission after the record had been remanded to the Commission by the Superior Court of Pennsylvania. The sole purpose of this participation as stated by counsel for the Commission in this record (R. 50a) was to correct certain deficiencies that the Commission believed existed in the record. The principles of judicial review or the safeguards of full and complete hearings do not preclude such action on the part of the Public Utility Commission. As stated by the late Chief Justice Hughes in *Ford Motor Co. v. National Labor Relations Board,* 305 U. S. 364, 375, 59 S. Ct. 301, 308 (1939):

> "There is nothing in the statute, or in the principles governing judicial review of administrative action, which precludes the court from giving an administrative body an opportunity to meet objections to its order by correcting irregularities in procedure or *supplying deficiencies in its record,* or making additional findings where these are necessary, or supplying findings validly made in the place of those attacked as invalid." (Emphasis added.)

As stated at page 373 in the same opinion:

> "The purpose of the judicial review is consonant with that of the administrative proceeding itself—to secure a just result with a minimum of technical requirements."

That is precisely what has transpired in this proceeding.

The matters introduced into evidence in this proceeding by the Commission involved documents and proceedings to which appellant was a party and in connection with which a more than adequate opportunity was presented to appellant for the presentation of any rebuttal testimony deemed necessary.

Appellant, in its "Statement as to Jurisdiction" has attached what is known as "Appendix B". In "Appendix B" appellant without any foundation therefor states that counsel for the Commission submitted the proposed decision to the Commission. A review of the evidence and the record as certified to your Honorable Court will reveal that nowhere in the record, or elsewhere, have such facts been presented and, in fact, not only did the Pennsylvania Public Utility Commission make the order complained of, but the Pennsylvania Public Utility Commission made exhaustive findings of fact and conclusions of law to support its order. It may or may not be that the Pennsylvania Public Utility Commission relied on staff reports in determining the proper terminology to be used in its report and order, after having made full review of the record and after having come to its independent conclusion. Certainly, the Commission was entitled to do this. In *Norris & Hirshberg v. Securities and Exchange Commission*, 163 F. 2d 689, the Court had a similar situation before it and stated, as follows, commencing at page 693:

> "(8, 9) The Commission asserts, and upon remand doubtless will certify, that the summary was not considered as, or in lieu of, the actual evidence. That being true, it falls in the category of internal memoranda made during the decisional process which are never included in a record. An administrative agency, such as the respondent here, may utilize the services of subordinates to sift and analyze the evidence received by the trial examiner and subsequent use by the agency of a written resume of that sifting and analyzing is a part of its internal decisional process which may not be probed on appeal.
>
> As the summary is said to have been prepared by employees simply to aid in the Commission's examination of the record, its use appears to have been a

> part of the Commission's decisional procedure. We are not concerned with the manner in which the Commission give consideration to the record; it is enough if it certifies that its findings arise therefrom. That much is required, but not more. It was, consequently, neither necessary nor proper for the digest of evidence used by the Commission to be made a part of the transcript, if the digest was used only as a help in considering the true record, as the Commission asserts."

In this case the Court also cited with approval and as controlling authority the case of *Morgan v. U. S.*, 298 U. S. 468.

It is true that in conducting proceedings such as this adequate safeguards must be provided so that a full and fair hearing may be provided to all. In the present case a full and fair hearing was provided at all times and every conceivable issue which the appellant wished to raise was permitted. The nature of the charges were known to the appellant at all times and at no time did appellant claim that the nature of the charges were unknown to it.

Appellant states in its "Statement as to Jurisdiction" a vague thought that in the present case:

> "The question of borrowing and transplanting evidence from other cases into this case remains unanswered. Appellees did not attempt to justify or excuse such practice. Appellant was faced with some old transcripts of testimony and letters. It was impossible to cross examine the persons involved in these papers forced upon us as evidence."

It is noteworthy that appellant does not refer to any particular part of the record nor to any particular evidence in the case. Certainly, evidence was not transplanted from other cases. The only evidence in the case was presented at the hearing and appellant had an ample opportunity to

examine and to explain all evidence submitted. It is true that the records of the predecessor company of appellant were present at the hearings but such were used only to contradict or as admissions. Nowhere was evidence transplanted from other cases in which appellant was not a party or not had an opportunity to cross-examine witnesses.

The question presented above is without merit and the factual issues raised, if any, are not substantiated by the record as certified and such question as raised is insufficient to sustain its appeal.

The next question presented by the appellant in its "Statement as to Jurisdiction" is as follows:

> "(b) Does the statute authorize the Pennsylvania Public Utility Commission and the Courts below to arbitrarily ignore the prior interpretative decisions by the said Commission and to subject appellant to restrictions or penalties, although the Commission had previously held otherwise in a substantially similar case?"

There certainly is no Federal question presented by the above. Even if the Pennsylvania Public Utility Commission and the Courts below had filed prior interpretative decisions there would have neither been error at the State level nor at the Federal level. Neither the Pennsylvania Public Utility Commission nor the Courts are bound by stare decisis. This has been decided by your Honorable Court on numerous occasions. In any event, the Commission and the Courts did not ignore any prior decisions and it is interesting to note that the appellant does not point out any prior decisions which even it believes to be contradictory.

In numerous cases it has been held that the administrative agency's interpretation of its own order and certifi-

cate cannot be disregarded by the Courts. See *I. C. C. v. G. & M. Motor Transfer Co., Inc.*, 64 F. Supp. 302 (D. C., N. C., 1945); *U. S. v. Louisville & Nashville RR. Co.*, 235 U. S. 314 (1914); *Adirondack Transit Lines, Inc. v. U. S.*, 59 F. Supp. 503 (D. C., N. Y., 1944); *Dart Transit Co. v. Interstate Commerce Commission*, 110 F. Supp. 876 (District Court, Minnesota, 1953); and *Bowles v. Seminole Rock and Sand Company*, 325 U. S. 410.

Since the issue presented above involves no Federal question and is in conformity with State law, such question is not sufficient to sustain the jurisdiction of your Honorable Court in this matter and the appeal should be dismissed.

The next question presented by the appellant in its "Statement as to Jurisdiction" is as follows:

> "(c) Does the statute authorize the Commonwealth of Pennsylvania to deprive appellant of vested rights which it had prior to the enactment of the statute, and in substance to repudiate the certificate made by the Public Utility Commission or its predecessor in office?"

The issue presented above again involves no Federal question whatsoever. Certainly, the statute relied upon by the appellant does authorize even a cancellation of the certificate of the appellant if proper procedure is followed. However, in the present case the sole effect of the order of the Pennsylvania Public Utility Commission was to explain and interpret the certificate of public convenience outstanding and issued to it. A certificate of public convenience and necessity is not a vested right but is merely a privilege granted by the Pennsylvania Public Utility Commission by virtue of legislative authority. Such privilege is subject to interpretation and even cancellation if proper safeguards are provided.

It is interesting to note that appellant continues to speak of being deprived of certain rights. However, the report and order of the Pennsylvania Public Utility Commission did not impose any penalties whatsoever and did not in any way affect or punish appellant for acts done in the past. The report and order of the Commission merely passed upon whether or not appellant had violated its certificate and then issued a warning that same should not be violated in the future. Clearly, this is authorized by the Pennsylvania Public Utility Law and, clearly, appellant was dealt with kindly and lightly in view of its persistent illegal operations. Needless to say, appellant had no vested rights prior to enactment of the statute and, certainly, appellant nowhere substantiates this statement either by facts or law.

There is nothing set forth in the issue above which presents a Federal question.

The next question presented by the appellant in its "Statement as to Jurisdiction" is as follows:

> "(d) Did the Courts below fail to protect appellant's right to due process of law and equal protection of the law as required by the 14th Amendment to the Constitution of the United States?"

Apparently, the issue presented above is merely a catch-all question pertaining to the other specific questions. A review of the "Statement as to Jurisdiction" reveals no other issues not heretofore answered. However, it is submitted that the record as certified to your Honorable Court will reveal that at all stages of the proceedings before the Pennsylvania Public Utility Commission and the Appellate Court of Pennsylvania, a full hearing was allowed including the right to file briefs and the right to oral argument before the Pennsylvania Public Utility Commission and the Appellate Court.

Such being the case, it seems apparent that no Federal questions have been presented by the present appeal and, certainly, appellant at no time has been denied due process of law or equal protection of the law as required by the 14th Amendment to the Constitution of the United States. The motion to dismiss the appeal should be sustained.

The next question presented by appellant is as follows:

> "(e) Does the statute authorize the Pennsylvania Public Utility Commission to prosecute a complaint against appellant upon one clearly stated ground and then make a blanket cease and desist order against appellant covering all property, denying to appellant equal protection of the law in violation of the 14th Amendment of the Constitution of the United States?"

In the present proceeding the Commission did not file the complaint and, therefore, of course could not have prosecuted the complaint. The complaint was filed by an individual carrier and the individual carrier assumed the burden of going forward. It is true that a Commission attorney appeared and assisted in the introduction of certain evidence which was pertinent to the proceedings. All such evidence introduced was subject to cross-examination and was relevant to the issues involved and at all times appellant had fair and complete opportunity to examine the evidence, to cross-examine concerning the same and to introduce any evidence it wished in rebuttal.

Even though this was a private complaint, nevertheless the Commission did not impose any penalty whatsoever. Again, the Pennsylvania Public Utility Commission merely explained and interpreted the certificate of public convenience and necessity of the appellant. Even though the appellant had conducted open and flagrant violations of law for years covering all commodities, nevertheless the Commission in its fairness merely ordered the appellant to cease and desist from such operations as it had conducted

in the past and ordered it not to commit future violations for which no penalty was attached or has been attached in this proceeding. Certainly, there has been no violation of appellant's rights under the 14th Amendment of the Constitution of the United States.

Only one other issue need be set forth herein. The issue to be argued below is not presented in any of the questions set forth in the "Statement as to Jurisdiction" of the appellant. However, in the "Statement as to Jurisdiction" filed by the appellant, under the heading "Statutes Involved", appellant states that the Pennsylvania Public Utility Law has a provision providing for the right to jury trial in certain types of cases.

It is true that the Pennsylvania Public Utility Law, under Section 1110, reserves the right of jury trial in any issue of fact where such right is secured either by the Constitution of Pennsylvania or the Constitution of the United States. In the present case the right of trial by jury for violation of a privilege granted by the Legislature is certainly not of such type as to be secured either by the Constitution of Pennsylvania or of the United States. Furthermore, in the proceeding before the Commission, the appellant at no time requested a jury trial. This issue was also never raised on appeal or at any time by appellants until the present time. Apparently, since appellant does not set forth any argument concerning this issue, it is not seriously pressing the same.

IV.

CONCLUSION.

Since appellant has failed to reveal jurisdiction of this Honorable Court under any statute set forth and, since there is no substantial Federal question involved, the parties hereto move that the appeal be dismissed.

March 14, 1955

Respectfully submitted,

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Certificate of Service.

I have this day mailed to all Counsel of Record herein, copies of the within Motion to Dismiss Appeal, in postpaid, properly addressed covers.

PAUL F. BARNES.

March 14, 1955

No. 600. W. J. DILLNER TRANSFER CO. *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL. Appeal from the Supreme Court of Pennsylvania, Western District; and

No. 601. W. J. DILLNER TRANSFER CO. *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL. Appeal from the Supreme Court of Pennsylvania, Middle District. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for want of a substantial federal question. *J. Paul Rupp* and *Ernie Adamson* for appellant. *Thomas M. Kerrigan* for the Pennsylvania Public Utility Commission; and *Harold S. Shertz* for Highway Express Lines, Inc. et al., appellees. Reported below: See 175 Pa. Super. 461, 472, 107 A. 2d 159, 164.